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UNITED STATES DISTRICT COURT

DISTRICT OF NEW HAMPSHIRE

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UNITED STATES OF AMERICA,

v.

18-cr-00192-JL-1
December 7, 2020
9:17 a.m.

* * * * *

EXCERPT TESTIMONY OF JOHN COMMISSO
BEFORE THE HONORABLE JOSEPH N. LAPLANTE

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1 P R O C E E D I N G S

2 THE CLERK: The Court has before it for
3 consideration this morning day three of an
4 evidentiary motion hearing in criminal case
5 18-cr-192-JL, United States of America versus
6 Imran Alrai.

7 Morning, Judge.

8 THE COURT: Morning, everyone. I
9 apologize. I'm struggling to kind of master
10 all of the tech that goes on around here to
11 keep us going when the staff is remote or where
12 we're remote. And between the stuff we use to
13 communicate with each other and just the
14 regular email, I find myself groping blindly.
15 So, I'm sorry to make you wait so long.
16 Anyway, let's get back underway.

17 I know we're still with Mr. Commisso, so
18 let's continue.

19 MS. BROWN: Thank you, Your Honor.

20
21 DIRECT EXAMINATION

22 BY MS. BROWN:

23 Q. Good morning, Mr. Commisso.

24 A. Good morning.

25 Q. We finished questioning -- I think it was

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1 Thursday afternoon; correct?

2 A. Yes.

3 Q. Between now and then, have you talked to anyone
4 about your testimony in this matter on
5 Thursday?

6 A. So, yes, conversations with some family members
7 briefly just to let them know that I had
8 testified for the first time in a case. And I
9 spoke with my client just to let him know that
10 we had the hearing and that it was continuing.
11 I spoke with John Meyer because we needed to
12 figure out the schedule and his availability.
13 I did not speak about the substance of my
14 testimony with John Meyer, but I needed to deal
15 with scheduling issues.

16 And I spoke with Mr. Davis for the same
17 reason, which was to talk about the scheduling
18 of John Meyer's testimony. But we did not
19 discuss the substance of my testimony.

20 Q. That's your complete -- nothing else?

21 A. Right.

22 Q. And along the same vein, after you testified on
23 Thursday, did you go back and review any
24 documents related to this case?

25 A. Yes, I looked at several things since last

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1 Thursday.

2 Q. Is that because some of the questions made you
3 think you had to go back and review them to
4 refresh your memory?

5 A. Well, I guess partly, yes; and partly (audio
6 interference) -- so I wanted to be fresh again
7 this morning as I felt like I was fresh last
8 Thursday.

9 THE COURT REPORTER: This is the court
10 reporter. Your answer was somewhat garbled.

11 Will you please try to reconstruct your
12 answer?

13 THE WITNESS: Is it a problem with my
14 audio connection?

15 THE COURT REPORTER: It is for me.

16 THE COURT: A little bit.

17 You said "partly yes and partly no" to the
18 question, and then you were explaining.

19 THE WITNESS: Right.

20 So this was reviewing documents. I had
21 reviewed the documents before Thursday's
22 hearing, and I felt like I was fresh on
23 Thursday for testimony. And so since then,
24 I've reviewed several documents so that I would
25 feel fresh and have the information fresh in my

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1 mind for this morning's testimony.

2 Q. (By Ms. Brown) I want to take you now back to
3 June of 2018. Specifically, the day that
4 Mr. Alrai physically left the employment of the
5 United Way.

6 I remember at trial there was a term that
7 was used, "offboarding"; is that a term you
8 use, or somebody else might have used that at
9 trial?

10 A. Well, I didn't testify at trial --

11 Q. Obviously, but I just --

12 A. I'm familiar with it in the employment law
13 context.

14 Q. But you know what day I'm talking about?

15 A. Well, June 12 was the day that I interviewed
16 him and he was placed on leave.

17 Q. And that, as far as you know, was the last time
18 he was ever physically at the United Way
19 offices; correct?

20 A. Yes, that's correct, as far as I know.

21 Q. And the June 12 date that you just spoke about
22 -- that was also the date that both you and
23 Mr. Mulvaney, the Mr. Mulvaney we spoke about
24 on Thursday -- that was the day that both of
25 you interviewed Mr. Alrai; correct?

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1 A. That is correct.

2 Q. And when you set that meeting up, you had that
3 date in mind. It wasn't sort of a spontaneous
4 thing.

5 You had coordinated that was the day that
6 you were going to show up at United Way and
7 interview him with Mr. Mulvaney; correct?

8 A. We had planned that that was going to be the
9 day of the interview, yes.

10 Q. And just to go back a little bit.

11 We spoke on Thursday that prior to that
12 date, meaning June 12, you had already spoken
13 to the U.S. Attorney's Office at least once;
14 right?

15 A. At least twice, I guess, yes.

16 Q. And so one of those, as we discussed -- I'm not
17 going to go into it -- was a meeting about the
18 allegations of fraud against Mr. Alrai.

19 And there were other contacts regarding a
20 grand jury subpoena on June 4; right?

21 A. Yes. And I think the first meeting may have
22 been the one where Rich Vossio and I, together,
23 met with Mr. Davis and one or two agents, and
24 really began the discussion of what we
25 internally had been investigating.

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1 THE COURT: Let me just say this.

2 I think we are going to have a little bit
3 of a struggle today with the court reporter and
4 Mr. Commisso's audio. I don't know if it's
5 your mic, or what's going on, John.

6 You're probably not in the office; right?

7 THE WITNESS: No, I'm at home. It usually
8 works well, but it's broken up. What I can do
9 is plug in a headset and see if that works --
10 if that helps. So just give me one minute to
11 get the headset.

12 THE COURT REPORTER: Thank you.

13 THE COURT: I'm definitely following, by
14 the way. I'm hearing it all. It's just that
15 it's -- I know the reporter's got to be typing
16 all day...

17 THE WITNESS: I have two children who are
18 doing their school from home, so they're taking
19 up the bandwidth right now. But maybe the
20 headset will help, if you'll just bear with me.

21 THE COURT: How could you let trivialities
22 like that interfere with what we're doing here?

23 THE WITNESS: Can you hear me through the
24 headset?

25 THE COURT: About the same so far. Let's

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1 see how it goes.

2 Could you hear me? Can you hear us,
3 Mr. Commisso?

4 THE WITNESS: I can hear you clear.

5 THE COURT: It's about the same for now.

6 Let's just see how it goes.

7 THE COURT REPORTER: And do me a favor.

8 There was a name mentioned in your last
9 answer and I didn't get the gentleman's name.

10 THE WITNESS: Well, the gentleman I
11 referred to -- his name is Richard Vossio.

12 Q. (By Ms. Brown) If I recall, you were
13 describing a May meeting that involved
14 Mr. Vossio, Attorney Davis, and yourself.

15 I think -- did I capture -- some FBI
16 agents, you said, were in that May meeting?

17 A. Yeah, at least one agent, maybe two. And that
18 would have been in June. There were no
19 face-to-face meetings in May --

20 Q. Thank you for clarifying that.

21 A. -- that I recall.

22 Q. And if we are focusing on June 12 as the day
23 that you interviewed Mr. Alrai, that meeting or
24 meetings that you discussed happened before
25 that date?

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1 A. Yes. There's an FBI 302 report that will give
2 you the date when the meeting with Mr. Davis
3 and Mr. Vossio took place.

4 Q. And I'm not that interested in questioning you
5 about that right now. I just want to set it in
6 a context of what happened before the
7 June 12th, so that's really where I'm going
8 with that.

9 So back to June 12. You already said you
10 had set up this meeting for you and
11 Mr. Mulvaney to meet with Mr. Alrai.

12 Had you coordinated that meeting with
13 either the U.S. Attorney's Office or the FBI?

14 A. I would not say that we coordinated it. I
15 would say that we had discussions before the
16 meeting on June 12 with -- certainly, with
17 Mr. Davis. I don't recall speaking to anyone
18 other than Mr. Davis. We discussed a lot of
19 issues. And to the extent that I was able to
20 share information with him, I shared
21 information with him.

22 My memory is he shared very little
23 information with me because there are rules and
24 laws that, I believe, prohibited him from
25 sharing information with me. So I would not

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1 say that we coordinated, but we communicated
2 about a lot of things before June 12.

3 Q. Well, I guess when I was using the word
4 "coordinated," it's my understanding when
5 Mr. Alrai physically left the building of the
6 United Way, he was greeted by at least one, if
7 not more, FBI agents. So they would have had
8 to have known he was going to be there that
9 day, speaking with you, to greet him.

10 So that's more what I meant by
11 "coordinated"; not necessarily discussions, but
12 the fact that the FBI would be there that day.

13 A. So Mr. Alrai, in a typical workday or workweek,
14 he was only physically present in Boston on
15 Tuesdays and Thursdays. And let me just pause.

16 If the audio is really bad, I can also
17 call in from my cell phone, and we might have a
18 much better connection if I was speaking
19 through my cell phone.

20 THE COURT REPORTER: I would not try to
21 dissuade you from doing that if you think it
22 will be better. This is the court reporter.

23 THE WITNESS: So do you want to pause
24 right here and have me dial in through my cell
25 phone?

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1 THE COURT: Yeah.

2 Charli, that works; right?

3 THE CLERK: It does. The only caveat is
4 you should just mute your video so that there's
5 no echo.

6 THE WITNESS: Yes. So if we can just take
7 a three-minute pause here, and I'm going to do
8 some technical work on my end, so bear with me.

9 (Recess taken at 9:29 a.m., and the
10 proceedings resumed at 9:35 a.m.)

11 Q. (By Ms. Brown) My point was -- in the
12 questioning we just had was that you had
13 communicated with law enforcement, be it FBI or
14 U.S. Attorney, about this meeting on the 12th?

15 A. Yes. I communicated with them. We had -- we
16 were planning a meeting on the 12th. And I
17 provided information to law enforcement before
18 we had that meeting, yes.

19 Q. I'm going to move on to another topic, and we
20 discussed this a little bit on Thursday. And
21 that was the letter that you wrote that is now
22 Exhibit A -- was attached to the Government's
23 motion, which is document 50.

24 You know which letter I'm talking about?

25 A. Yes.

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(Pre-marked Defendant's Exhibit A
introduced.)

Q. (By Ms. Brown) And I specifically asked you about a section of that letter where you talked about trying to get additional -- produce additional documents from e-discovery regarding documents that RSM had either reviewed or assessed. And that's on page 5 of document 50-1-2.

Do you remember me asking you some questions about that?

A. Yes.

Q. And the one question I neglected to ask you about that was that either before or after you wrote that letter, did you communicate to RSM that you were looking for documents that they had reviewed or assessed? Or did you do that search on your own without communicating with RSM?

A. I just want to make sure I understand the question.

Q. Okay. It's a long question. I can rephrase it, if you'd like.

A. Sure. Go ahead, and I'll try my best to answer it if I understand the question.

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1 Q. Yeah. So it's probably a good start -- so this
2 letter is dated November 21, 2019, document
3 50-1-2.

4 And as I said, you had stated in that
5 letter -- and I'll just read that sentence --
6 "Nevertheless, UWMB is currently working to
7 produce any documents from e-discovery database
8 which RSM reviewed and/or assessed, and which
9 were not previously produced."

10 So my question about that that I didn't
11 ask was, did you go on the search for those
12 documents? Or did you communicate what you had
13 put in that letter to RSM to ask them to look
14 for documents that you had described? Or did
15 you do both?

16 A. So let me answer this way, and hopefully it'll
17 answer your question.

18 We had a request from Mr. Harrington. I
19 think we had two requests from Tim Harrington.
20 And I think by this point, we actually may have
21 had the motion to exclude Naviloff's testimony.
22 And, I believe, the final pretrial conference
23 may have been on November 15. Oh. It's right
24 here on the first page of the letter.

25 "Final pretrial conference on

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1 November 15." There were lots of things that
2 happened from July to November 21 that were
3 all -- that were about, in part,
4 Tim Harrington's request for documents. And so
5 my focus through this entire process was to
6 understand what he was requesting and
7 understand what may need to be produced, to
8 understand what could be produced in a
9 reasonable fashion without too much time,
10 delay, or burden. And, most importantly, as
11 the representative of United Way, what did I
12 have access to or control over?

13 So my focus always was, are there United
14 Way documents that we haven't produced, that
15 Tim Harrington may be looking for, and what
16 could we do to produce them? If we're not
17 going to produce them, why -- I guess is how I
18 was thinking. So during those months from July
19 to November, from Tim's -- July is when
20 Naviloff was retained by the Government.

21 Mr. Harrington started making discovery
22 requests. He made some in, I think, July,
23 August, September, and October. He filed a
24 motion to exclude Naviloff's testimony. Judge
25 held a final pretrial conference. And during

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1 all that time, I was focused on what are they
2 looking for from me with respect to United Way
3 documents?

4 And while I was focused on that, I was
5 talking with RSM about documents that they may
6 have, and I was talking with the Government to
7 understand what the Government may be looking
8 for in response to things from us. But the
9 Government didn't have the documents.

10 So, now, I'm not sure I answered your
11 question, but I tried to give you context so we
12 can hopefully get to the answer to your
13 question.

14 Q. And I think you did not answer my question, so
15 I'm going to repeat it. And just to be clear,
16 all I'm trying to find out here is -- you made
17 this representation in this letter that was
18 attached to a motion.

19 What did you do -- not the reason you did
20 it -- what I'm looking for is what you did
21 towards finding those documents that you said
22 that you were working to produce -- documents.
23 So what I don't understand from that sentence
24 is whether working to produce documents from
25 e-discovery means that all that happened from

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1 that representation is you went and looked at
2 the e-discovery available to you.

3 Or did you pass along that effort to RSM
4 and ask them -- say, "Hey, can you send me
5 documents that you reviewed or assessed that
6 had not previously been produced?" So that's
7 all I'm trying to find out -- what actions you
8 took towards that representation.

9 A. So one piece of it is described in detail in
10 the letter, which was we had an e-discovery
11 database. We had produced a whole lot of
12 documents already.

13 And what I described in the letter was an
14 effort to find out are there any documents in
15 that e-discovery database that anyone at RSM
16 had accessed in any way? And, if so, if they
17 haven't been produced, let's produce them.

18 So if you just draw a box around the
19 e-discovery database, any document in that
20 database that any member of the RSM team
21 touched in any way -- accessed -- they didn't
22 have to study it, but they had to click on it
23 and they had to access it in some way -- all of
24 those documents were produced as a result of
25 the work that was done that is described in

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1 that letter. So that's one piece of it.

2 Q. And I just want to clarify the term "we,"
3 because that can be confusing.

4 THE COURT: Which letter now? What's the
5 date on that letter?

6 MS. BROWN: November 21, I believe. Yes.

7 THE WITNESS: It's marked as Exhibit A.

8 THE COURT: Okay. That one. Yeah.

9 Q. (By Ms. Brown) So you used the term "we" in
10 referring to access to the e-discovery.

11 By "we," do you mean you, or you and RSM?

12 A. I mean me.

13 When I'm talking about contacting Kroll,
14 the vendor, and saying "how can we find all the
15 documents that anyone at RSM may have touched?"
16 That's me. I'm the one calling Kroll and
17 emailing Kroll. RSM was not involved in that
18 process at all. It was my e-discovery
19 database, for lack of a better term. I mean,
20 it was United Way's database. I was the
21 e-discovery expert or supervisor, for lack of a
22 better term.

23 So I'm in a relationship with Kroll.
24 They're my vendor. So I communicate with Kroll
25 about the nuts and bolts of how do we find

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1 these documents and produce them?

2 THE COURT: We're really having trouble
3 with the audio now.

4 THE CLERK: I have a suggestion. It might
5 be easier if you leave the meeting and then
6 rejoin, just so that you have established a new
7 connection. It's pretty garbled.

8 THE COURT: You want him to basically --

9 THE CLERK: Leave the meeting and then
10 just rejoin.

11 THE COURT: I guess give it a try, John.
12 Try to just terminate and rejoin.

13 THE WITNESS: I'm going to do that, and I
14 will be back in a minute.

15 (Recess taken at 9:44 a.m., and the
16 proceedings resumed at 9:47 a.m.)

17 THE COURT: Okay.

18 THE WITNESS: I am back.

19 THE CLERK: Welcome back.

20 THE COURT: You can pose your question,
21 Counsel.

22 Q. (By Ms. Brown) I think if I clarify what I'm
23 trying to get at, it might make the answers a
24 little shorter.

25 What I'm trying to understand from these

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1 emails that we've been reading -- it sounds
2 like RSM has their own internal access to data,
3 and that you have this e-discovery file that's
4 managed by Kroll.

5 And what I don't understand -- are they
6 the same thing? Do you have more? Do they
7 have less? So that's what I'm not
8 understanding of -- so here's the issue. You
9 said you looked in the e-discovery to see if
10 they accessed it.

11 Did they have their own copy of that that
12 they could have accessed without you knowing
13 about it? I guess that's where I'm going.

14 A. So a few things. No, they did not have their
15 own copy of the e-discovery database. They did
16 have the ability to access the e-discovery
17 database, but not at this point in time that
18 we're talking about.

19 At the time we got close to trial, that
20 e-discovery database had been taken offline and
21 nobody had access to it. I had United Way
22 documents that were not in the e-discovery
23 database that I had access to. And I assume
24 and believe that RSM had their own documents in
25 some sort of document management and document

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1 storage system, so, I guess, their own ability
2 to do their own searches or to make whatever
3 efforts they needed to do or felt they needed
4 to do to respond to the Government's requests.

5 Does that clarify? There are documents in
6 different places, and different people have
7 different levels of control over those
8 documents.

9 Q. And that's what I was trying to ascertain. So,
10 thank you. That does give a little bit of
11 clarity.

12 A. Is the quality of the connection any better?

13 THE COURT: No.

14 MS. BROWN: It's not great, but it's a
15 little better. I think there's kind of a tinny
16 quality.

17 Q. (By Ms. Brown) I just want to clarify this
18 point, which is when you put in the letter
19 that's Exhibit A that you were looking to
20 produce documents that RSM reviewed or
21 assessed, part of that effort --

22 It doesn't sound like you sent an email or
23 made a phone call to RSM saying, "Hey, can you
24 make sure that I have everything you reviewed
25 or assessed?" Sounds like you didn't do that;

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1 right?

2 A. Well, no, I didn't, because my focus was on
3 United Way's documents. And I had control over
4 United Way's documents, even if RSM may have
5 had similar documents that they received from
6 United Way.

7 So, for example, the e-discovery database
8 is one example. I had control over United
9 Way's documents in the e-discovery database. I
10 didn't need to talk to RSM to understand what
11 should be produced from that database.

12 In addition, if RSM asked for documents
13 from somebody -- just as an example, from the
14 accounting department, from somebody like
15 Domenic Pallaria, who was the controller -- if
16 RSM wanted a copy of a document, a spreadsheet,
17 a report, a bank statement -- those documents
18 would come to me so that I could then provide
19 them to RSM; but also so that I could have a
20 document collection and management system so
21 that I would know what I had sent to RSM, and
22 then I knew that I also needed to send it to
23 the Government.

24 So I think I'm answering your question,
25 because I don't need to talk to RSM about what

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1 documents they have. Because it's the United
2 Way's documents, I was confident that I already
3 had control of those documents.

4 Q. So I think that was a longer way of saying that
5 my assumption was correct, which is you didn't,
6 either by email or phone call, contact RSM to
7 make sure that they had not assessed or
8 reviewed something that had not already been
9 produced?

10 A. Well, I think -- let me explain.

11 So in addition to everything else I've
12 discussed, we did have phone calls. And, in
13 fact, there are emails that show the series of
14 folders and names of folders. And I think we
15 may have talked about it last time how they
16 shared some of that information with me. And
17 then we had phone calls.

18 And so the purpose of that -- so in
19 addition to me feeling confident that I knew
20 what RSM had from the United Way, we went above
21 and beyond. We went many steps further,
22 because I had calls and emails with
23 Christopher Fitzgerald and Greg Naviloff where
24 they sent me these names of folders and
25 described for me the types of documents they

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1 had collected.

2 And we went through them and discussed
3 them. And I was able to say for some large
4 number of those documents -- maybe all of them,
5 I don't remember.

6 I was able to say "that folder right there
7 that contains all the reports that
8 Domenic Pallaria generated from the accounting
9 department -- I've already produced that. I
10 have that exact same folder with those exact
11 same documents. You got these from me."

12 So we went through a process like that
13 where together, we tried to figure out "what do
14 I have for the United Way; and what do they
15 have?" And when I say "what do they have" --
16 if they were RSM documents, that was not my
17 responsibility to produce. My responsibility
18 only was to weigh in as to the possibility of
19 attorney-client privilege.

20 Q. Well, because you had a reviewing status as to
21 the posttrial discovery production as it
22 related to United Way, you're familiar that one
23 of the things that was produced after trial was
24 a network scan with multiple tabs on it;
25 correct?

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1 A. Yes.

2 Q. And you would also agree with me that while
3 maybe one or two of those tabs might have been
4 produced pretrial, that entire network scan
5 that was produced after trial was not produced
6 pretrial?

7 A. I don't know all the details, but what you just
8 described is what I understand. But I'm not
9 familiar with all the details of that schedule
10 compared to other schedules.

11 Q. Well, I guess what I'm trying to understand is
12 how that happened that only part of the network
13 scan was produced pretrial, and then
14 afterwards, we find that there are -- there was
15 more to the file than had been produced
16 pretrial.

17 So were you part of that, or are you
18 saying you don't understand how that happened?

19 A. Well, I can tell you what I was part of and
20 what I understand.

21 Mr. Harrington made a request.

22 And I don't know if he specifically said
23 "network scan," but something like that. And
24 so we went -- we took an effort to find
25 anything that we could produce that was a

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1 network scan. And from my perspective, the
2 effort was, if we have anything like this,
3 let's find it and let's produce it. He
4 specifically asked for it, and we wanted him to
5 have it. That's the approach that we took.

6 And I think he may have asked for it more
7 than once. So my state of mind was, it seems
8 like this exists. Let's find it and produce
9 it. So what did I do? I talked to the people
10 who might have it. So I spoke with John Meyer.
11 I probably emailed him as well.

12 And I said, "Do we have something called a
13 network scan?" And I got a response from
14 John Meyer.

15 And I believe he sent me a document that's
16 called a "network scan" or something similar.
17 And we produced it -- one version of that --
18 before trial that I believe came from
19 John Meyer.

20 Similarly, I communicated with RSM and
21 said, "Tim Harrington is looking for something
22 called a network scan. Do we have it? Let's
23 find it and let's produce it."

24 THE COURT: Audio is not happening.

25 Mr. Commisso, let me ask you a question.

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Are you in a position to go to your office and do this? Or are you too far away?

THE WITNESS: I'm too far away. I'm trying to think. But my other options might be from what I have at home. One option --

THE COURT: Let's go off the record here.

(Recess taken at 9:58 a.m., and the proceedings resumed at 10:01 a.m.)

THE COURT: This is pretty meandering stuff. If I'm supposed to be getting a lot out of this, it's not happening.

I understand where you're trying to go, Attorney Brown -- I really do. But this isn't very straightforward stuff.

I don't know why -- Mr. Commissio, why don't you just answer the questions "yes" or "no"? You can always explain yourself. But these answers go on forever. Just answer her questions. I tell witnesses this all the time, and you must hear it. You're a trial lawyer -- criminal defense lawyer.

Answer "yes" or "no," and then explain your answer if you need to. But let me just say, if the situation of your involvement, and RSM, and United Way, and all the players is

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1 supposed to be getting clearer to me, it's
2 heading in the opposite direction. And that's
3 not good. So I'd appreciate just some real
4 straightforward examination and answers to
5 questions.

6 Q. (By Ms. Brown) And I will try to focus on what
7 I'm actually looking for, so you don't have to
8 give as long an answer, and maybe we can get
9 right to it.

10 So we were talking about that in the
11 post-conviction document production, there was
12 a network scan that had 40-plus tabs on it of
13 information that had not been produced
14 pretrial. So I don't need you to describe that
15 right now. I'm just putting that on the
16 record.

17 So a minute ago, you described the process
18 where you tried to, for lack of a better word,
19 assess what RSM looked at and didn't look at.
20 Because whatever you had -- any discovery --
21 would be what they had access to, as I'm
22 understanding this. So we now know that there
23 was -- like, there was that one network scan
24 produced pretrial. Now we know there were
25 multiple other network scans that were produced

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1 after trial.

2 So it sounds like you were describing, as
3 I understood it before we took a break, that
4 you got those documents directly from
5 Mr. Meyer; correct?

6 A. So before trial, I got a network scan from
7 Mr. Meyer. Before trial, there was a second
8 network scan that I believe came from RSM.
9 Those were the only two network scans I was
10 aware of. And now in the last month or so,
11 there was a third network scan. And I don't
12 know the history and origin of that network
13 scan.

14 Q. So you, personally, did not find this third
15 network scan.

16 It came from some other party?

17 A. I did not, personally, find the third network
18 scan.

19 Q. And you don't know whether it came from
20 Mr. Meyer or from RSM?

21 A. When you say "came from," you mean in
22 posttrial?

23 Q. Posttrial.

24 A. Somebody found it recently. I don't know for
25 certain, but I believe it was RSM that

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1 identified the third network scan that had not
2 been previously produced.

3 Q. And so can I assume from that that third
4 network scan was not in this e-discovery that
5 we were talking about earlier?

6 A. As far as I know, it was not.

7 Q. That's where I was going with that. Thank you.

8 A. If it had been, then it should have been
9 produced in the e-discovery process, but I
10 can't confirm that.

11 Q. But it wasn't produced; correct?

12 A. I don't know. I don't know if it was produced.

13 Q. Just so you know where I'm going with the next
14 question, I'm going to ask about your contact
15 with witnesses in this case. And I'm not
16 asking for detail about what was said, anything
17 like that. It's just who you had contact with
18 in preparation for trial.

19 So a lot of the witnesses at trial were
20 employees of United Way; right?

21 A. Some of them were, yes.

22 Q. And in preparation for trial, you met with and
23 prepared witnesses who were employed by United
24 Way for their testimony at trial?

25 A. I met with them to help them prepare for their

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1 testimony, yes.

2 Q. Would that apply to every United Way employee
3 who testified at trial?

4 A. I believe that's correct.

5 Q. Did you either meet with and/or talk to or
6 email Naviloff in preparation for his trial
7 testimony?

8 A. I certainly communicated with him. But for the
9 purposes of preparation, I don't -- I don't
10 remember meetings with him, and I don't know
11 that we really had any discussion that I would
12 characterize as preparing him for his
13 testimony.

14 Q. And I'm not going to go into a lot of detail
15 about this. And I asked some questions of
16 Mr. Naviloff a couple of weeks ago regarding
17 the October 4, 2018 email regarding --

18 A. Excuse me. I'm going to change my settings
19 here. Hopefully, we'll have a better
20 connection here. So just bear with me.

21 So I don't know if that will help or not,
22 but I thought of one idea that might improve
23 the connection.

24 So please start your question again.

25 Q. Sure.

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1 As I said, I was not going to go into a
2 lot of detail on this, but a couple weeks ago
3 when Mr. Naviloff was testifying, I asked him
4 about an email that you were involved in from
5 October 4, 2018, where you suggested revisions
6 to the RSM report.

7 You remember listening to that exchange of
8 testimony when Mr. Naviloff testified?

9 A. Yes.

10 Q. And you agree that as part of that exchange of
11 ideas on that email, you suggested revisions to
12 the report, including a suggestion that it be
13 titled -- or it say that Alrai "executed a
14 complex fraud scheme"?

15 You remember that email?

16 A. Yes. It may have already used those terms, but
17 I made a revision to that portion of the
18 PowerPoint presentation.

19 Q. And, in fact, you also suggested including that
20 "this complex fraud scheme included gaining
21 trust and deceiving multiple individuals"; that
22 was part of that same suggestion?

23 A. Yes, that's what my email said.

24 MS. BROWN: I don't have any further
25 questions.

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1 THE COURT: Thank you.

2 *Cross-examination, Mr. Davis, I assume?*

3

4 **CROSS-EXAMINATION**

5 **BY MR. DAVIS:**

6 Q. Good morning.

7 Mr. Commisso, you were and are an outside
8 counsel for United Way on all matters relating
9 to the Imran Alrai DigitalNet case; is that
10 right?

11 A. Yes.

12 And I would say -- you said "case," but I
13 would say all matters. So there were lots of
14 tentacles and spinoffs.

15 Q. Is your role limited to the criminal case?

16 A. No.

17 Q. And can you summarize briefly the major areas
18 that are not the criminal case that you have
19 been working on since the spring of 2018?

20 A. There are many of them, and they are described
21 in my declaration. But a few of them that come
22 to mind include dealing with the IRS, the
23 Massachusetts Attorney General's Office, the
24 New Hampshire Attorney General's Office, the
25 annual audited financial statements, the

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1 disclosure of those financial statements to
2 federal agencies and state agencies, responding
3 to federal and state agencies that provide
4 funding for United Way's social service
5 programs, dealing with public relations and
6 media relations issues, dealing with the
7 insurance company, dealing with Mr. Alrai's
8 attorneys before -- separate and apart from the
9 criminal case, and something called Charity
10 Navigator, which is a third-party watchdog
11 group.

12 And I've identified others in my
13 declaration, but that's a pretty good start.

14 Q. Of all of the total fees that your law firm has
15 billed United Way, did you calculate the
16 approximate percentage that relate to the
17 criminal case?

18 A. Yes. And I don't have it in front of me. It
19 is in the end of my declaration. But it's less
20 than 50 percent of my time and fees. And
21 that's just from my firm -- less than
22 50 percent concern the federal criminal case.

23 Q. The Court asked in this case to hear more about
24 the practical affect on the Defense of your
25 involvement in the prosecution, including in

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1 the documents disclosed in discovery.

2 Do you recall that question being asked?

3 A. Yes.

4 Q. What has your role been in the criminal matter
5 on behalf of United Way?

6 A. Well, I've already talked about the grand jury
7 subpoena and responding to the grand jury
8 subpoena. Overall, my responsibility is with
9 respect to United Way documents. So I want to
10 make sure that I produce documents in response
11 to the grand jury subpoena. And
12 Mr. Harrington, before trial, had a number of
13 requests, and I did my best to identify United
14 Way documents that could be produced to the
15 Government in response to Mr. Harrington's
16 requests.

17 And with respect to RSM documents, my
18 primary role was to understand privilege issues
19 and to make sure I protected my client's
20 interest in not disclosing privileged
21 information. And there were probably some
22 other things that I did. But the number one
23 thing was taking responsibility for United
24 Way's documents and protecting the privilege.

25 Q. In producing United Way's documents, did you

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1 pick and choose among the documents you decided
2 to produce?

3 A. Yes, in the sense that we had to run search
4 terms to try to find documents. But when we
5 found relevant documents, that was the --

6 The picking and choosing was "is this
7 relevant?" Not "is this good or bad?"

8 "Is this relevant to the issues as I
9 understand them or as they've been explained to
10 me?"

11 Q. And can you explain briefly your criteria in
12 deciding relevance of a United Way document?

13 A. So let's say it was broad in the sense that did
14 it concern Mr. Alrai, and DigitalNet, and their
15 dealings together? That's the broad way that I
16 would describe it -- and the services that
17 Alrai or DigitalNet provided to United Way, and
18 who paid for that, and who was involved in that
19 process from day one through the day payments
20 were made.

21 So just to give you an example, every time
22 somebody had trouble with the printer, just
23 getting a document to print on the printer, I
24 do not think that was a relevant document.
25 Because, frankly, we would have never finished

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1 discovery if we treated each problem with the
2 printer as a relevant document.

3 But, broadly speaking, if it related to
4 Alrai's services and DigitalNet's services,
5 then it was relevant.

6 Q. And did you produce every single relevant
7 document you identified that was not
8 privileged?

9 A. Yes.

10 Q. And in the posttrial discovery proceedings in
11 this case, have you become aware of any United
12 Way document that was exculpatory and that was
13 not produced before trial?

14 A. No.

15 Q. And have you become aware of any United Way
16 document that, under your relevancy criteria,
17 should have been produced before trial?

18 THE COURT: Look, I really don't -- his
19 answers and his opinions about these issues?
20 I've seen documents that are exculpatory that
21 were not produced before trial. We've been
22 talking about them in this hearing.

23 Now, you might disagree. And I understand
24 that, because reasonable minds can disagree.
25 But Mr. Commisso's opinion about what's

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1 exculpatory or what's relevant -- I'm not sure
2 what I'm supposed to do with that.

3 MR. DAVIS: Your Honor, I beg to differ,
4 only because I'm not asking about internal RSM
5 communications. I'm asking specifically about
6 United Way documents.

7 THE COURT: Oh. Okay.

8 MR. DAVIS: This man has been attacked 500
9 ways about United Way documents. So I'm just
10 asking if he's seen anything that should have
11 been produced from the United Way documents he
12 produced.

13 THE COURT: Okay. That's a distinction
14 that does matter.

15 Go ahead.

16 THE WITNESS: So my response to that is
17 look at every one of the Defendant's filings
18 after trial, and look at every one of the
19 attachments to those filings, and there is not
20 a single United Way document. I'm not talking
21 about RSM or anyone else's documents. There's
22 not a single United Way document that supports
23 the attacks against me. And I, frankly, find
24 it outrageous.

25 Q. (By Mr. Davis) I want to ask you about your

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1 role in the prosecution.

2 Were you the puppet master of the
3 prosecution team in this case?

4 A. No, I was not.

5 Q. Did you play any role in the drafting of the
6 indictment in this case?

7 A. No, I did not.

8 Q. Did you play any role in the grand jury
9 exhibits that were used in this case?

10 A. No, I did not.

11 Q. Did you receive any grand jury material in
12 violation of Rule 6(d)?

13 A. No.

14 Q. Did you play any role in the gathering of
15 documents from the myriad other sources besides
16 United Way that were collected in this
17 investigation?

18 A. No.

19 Q. Did you have any role in crafting the
20 Government's exhibit list for trial?

21 A. No.

22 Q. Did you have any role in choosing the witnesses
23 on the 40-person exhibit list the Government
24 used?

25 A. No.

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1 Q. Did you orchestrate the prosecution?

2 A. No.

3 Q. Now let's talk about preservation.

4 First of all, do you recall in the motion
5 in this case -- the motion to dismiss -- on
6 page two, the Defense assertion that on June 19
7 of 2018, Mr. Alrai sent you a message
8 requesting that you instruct United Way to
9 "preserve all IT data during the
10 investigation"; do you recall that assertion?

11 A. Yes, I do.

12 Q. And are you familiar with the letter from
13 Mr. Alrai's counsel on June 19 of 2018?

14 A. Yes, I am.

15 Q. And did that letter request that you instruct
16 United Way to "preserve all IT data during the
17 investigation"?

18 A. No, it did not.

19 Q. In fact, did it have specific requests about
20 what United Way was supposed to preserve?

21 A. Yes. There were seven or eight bullet points
22 of specifically identified data.

23 Q. And was one of those bullet points "documents
24 or correspondence related to any and all
25 requests for proposal for IT or similar

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1 technological support services"?

2 A. I believe so. I haven't looked through the
3 letter in a little while, but, yes. It lists
4 the documents and data about IT services.

5 Q. And were documents, in fact, preserved?

6 A. Yes. Every item on that list was, in fact,
7 preserved. And 100 percent, or nearly
8 100 percent, of those items were, in fact,
9 produced to the Government.

10 Q. And did that letter -- again, from Mr. Alrai's
11 counsel on June 19, just one week after he was
12 walked out -- did that include documents
13 related to committee meetings that Mr. Alrai
14 was on?

15 A. Yes.

16 Q. And did it include documents related to
17 committee meetings where the committee
18 discussed United Way's IT service providers and
19 structure?

20 A. Yes, and we produced those.

21 Q. And did it include documents or correspondence
22 related to all internal investigations, audits,
23 or reviews of the United Way's IT service
24 providers, structure, or operations, including
25 the recent information and audit by CBIZ and

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JOHN COMMISSO

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1 MHM?

2 A. So, yes, it requested those. We did not
3 necessarily produce all of that if it was
4 privileged. So if it was historic information
5 before the investigation, we would have
6 produced it. But if it was --

7 Q. But did you preserve all of that information?

8 A. Yes. Yes, it was all preserved.

9 Q. Did the letter on June 19, 2018, also request
10 that you preserve documents or correspondence
11 from, or copying, Mr. Alrai's United Way email
12 address?

13 A. Yes, we preserved those. And we produced a lot
14 of them, but not all of them.

15 Q. And did you also -- were you also asked to
16 produce or preserve documents or correspondence
17 related to Mr. Alrai's termination, including
18 Mr. Alrai's employee file and performance
19 reviews?

20 A. Yes. And, in fact, the employee file and
21 performance reviews, we produced directly to
22 Mr. Strauss (phonetic) within, I would say, two
23 to three weeks of his termination. So that was
24 a separate production different from the grand
25 jury production.

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1 Q. And so of the items on Mr. Alrai's very
2 specific preservation letter --

3 THE COURT: Can I interrupt, Mr. Davis,
4 with a question -- a clarifying question?

5 MR. DAVIS: Yes.

6 THE COURT: Mr. Commisso, when both of
7 you, Mr. Davis and Mr. Commissio, referred to
8 the grand jury production just then, what
9 exactly are you referring to?

10 THE WITNESS: You're asking me?

11 THE COURT: Sure.

12 THE WITNESS: I'm referring to the
13 documents that I produced to the Government.

14 THE COURT: Right, initially.

15 THE WITNESS: Or throughout the case.

16 But, yeah, those types of documents we produced
17 before the original indictment.

18 THE COURT: Yeah. That's what I'm asking.
19 Okay.

20 THE WITNESS: Yes.

21 THE COURT: I've never been, like,
22 1,000 percent clear on that, so that's helpful.
23 Thank you.

24 I'm sorry, Mr. Davis.

25 MR. DAVIS: Quite all right, Judge.

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1 Q. (By Mr. Davis) Let's just talk briefly about
2 what has been preserved at United Way. We
3 talked about network scans.

4 How many network scans have been
5 preserved?

6 A. At least three have been preserved and produced
7 to the Government and the Defendant.

8 Q. So the Defendant has three network scans right
9 now; is that correct?

10 A. Yes.

11 Q. Pictures or maps of the IT environment -- have
12 you produced those?

13 A. Yes, to the extent that they exist. And we
14 also -- to the extent they didn't exist, we
15 asked Mr. Alrai to either provide them or tell
16 us where we could find them.

17 Q. And did you make that request almost
18 immediately after his termination?

19 A. Yes, before the end of June, within two weeks
20 of his termination.

21 Q. And that was 2018?

22 A. Yes.

23 Q. And did you discover whether Mr. Alrai actually
24 kept pictures or maps of the IT environment?

25 A. Mr. Meyer, I believe, searched for that

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1 information. And he found one piece of paper
2 hanging in the IT room that just had a list of
3 computer names, or server names, or IP
4 addresses. And that was the sum total of the
5 documentation or map of the IT system.

6 Q. Did you preserve invoices and contracts
7 relevant to this case?

8 A. Yes, absolutely.

9 Q. Did you preserve emails relevant to this case?

10 A. Yes.

11 Q. Did you preserve PowerPoint presentations?

12 A. Yes.

13 Q. Did you preserve meeting minutes about IT
14 services of all kinds?

15 A. Yes.

16 Q. Did you preserve virtual desktop sessions at
17 United Way?

18 A. Yes, for certain key employees who were related
19 to the IT function.

20 Q. And did you preserve laptops and computers at
21 United Way?

22 A. Yes, for certain key employees related to these
23 issues.

24 Q. Did you preserve cell phones?

25 A. Yes.

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- 1 Q. And do you know how many?
- 2 A. I know there were at least two cell phones.
- 3 There may have been three. I just don't know
- 4 the exact number.
- 5 Q. Did you preserve servers?
- 6 A. Yes.
- 7 Q. And did you preserve websites?
- 8 A. Yes. And I don't know the technical side of
- 9 what that means, but, yes.
- 10 Q. And did you preserve log-in information?
- 11 A. I believe so. Of that, I'm not certain. Maybe
- 12 that's a question for Mr. Meyer.
- 13 Q. And at any point, have you suppressed any of
- 14 the IT information at United Way that has been
- 15 preserved?
- 16 A. "Suppressed" -- I'm not sure what the meaning
- 17 is, but I know the answer is no. So I guess
- 18 I'm not sure what you mean. Have I
- 19 suppressed --
- 20 Q. Meaning, have you been aware of an item that
- 21 Mr. Alrai was looking for that you had
- 22 preserved, that you decided not to turn over?
- 23 A. No. It was all driven by my obligation. So we
- 24 preserved a lot of evidence, and we turned over
- 25 a lot of evidence. But we didn't turn over

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1 everything, because I was following the rules
2 as they applied to the United Way of
3 Massachusetts Bay.

4 Q. Now, we've talked a lot in this case about
5 your -- or in your testimony about the
6 assertion of privilege on behalf of the United
7 Way.

8 Do you recall that?

9 A. Yes, I do.

10 Q. And you have described that you have asserted
11 privilege, and continue to assert privilege,
12 regarding the data breach investigation that
13 RSM was part of after Mr. Alrai was terminated;
14 is that right?

15 A. Yes, that's correct.

16 Q. And have you made up, recently, that data
17 breach investigation as a new and different
18 basis to assert privilege?

19 A. No, it's been asserted since the very beginning
20 of the engagement.

21 Q. And, just briefly, was the data breach
22 investigation clearly asserted as a basis of
23 privilege before the trial in this case?

24 A. Yes, it was.

25 Q. And can you describe briefly how that was done

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1 and when that happened?

2 A. Well, I guess, at least two things. One is
3 that I made it clear to the Government that we
4 considered it privileged, and that we had not
5 and would not produce documents concerning
6 that.

7 And then when Mr. Harrington began making
8 discovery requests in July, we produced
9 documents. And in at least one of those
10 documents, there's a reference to the data
11 security investigation.

12 And then there are about 15 to 20 pages of
13 a document that are redacted and stamped
14 "redacted."

15 Q. But you have never provided any privileged
16 documents related to the data breach
17 investigation to the Government; is that
18 correct?

19 A. That's correct. If I had, it would have been
20 inadvertent. Because I made it clear that I
21 did not intend to and did not want to provide
22 any of those documents.

23 Q. And as to the privilege log you recently filed
24 in this case, there are approximately 300
25 documents as to which you assert privilege; is

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1 that right?

2 A. Yes, that's correct.

3 Q. And is the privilege you're asserting related
4 to the date breach investigation?

5 A. Well, data breach and, in addition to that,
6 certain documents concerning the e-discovery
7 procedures that were in the Kroll database.

8 Q. But do those relate to Naviloff's loss analysis
9 at RSM?

10 A. No. The documents on the privilege log do not
11 concern -- are not within the scope of
12 Naviloff's loss analysis.

13 Q. And are you using the data breach investigation
14 or the Kroll e-discovery issue as a means of
15 masking or suppressing relevant information
16 from Mr. Alrai?

17 A. No. No, I've been working hard to turn over
18 everything from the United Way that concerns
19 Mr. Naviloff's loss analysis. And I'm not
20 looking to withhold or suppress anything that I
21 understand somebody's looking for and that it
22 relates to Naviloff's loss analysis.

23 Q. You've been accused of "selective assertion of
24 privilege"; do you recall that?

25 A. Yes, I do.

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1 Q. After you waived privilege with respect to the
2 RSM loss analysis investigation, were you
3 selectively asserting privilege?

4 A. No, I wasn't. It's clear, based on everything
5 that's been produced, we have waived the
6 privilege regarding the loss analysis. And
7 we're not using that, or any other privilege,
8 to shield documents concerning the loss
9 analysis.

10 Q. At this moment, is there any document that
11 you're aware of regarding the RSM loss analysis
12 that is being withheld from Mr. Alrai on the
13 basis of an assertion of privilege?

14 A. Not that I'm aware of.

15 THE COURT: Well, data security privilege,
16 though; right?

17 THE WITNESS: Right. But that does not
18 concern the loss analysis.

19 THE COURT: Right. Understood.

20 When -- Mr. Davis, when you were
21 questioning a minute ago regarding selective
22 assertion of the privilege after the waiver,
23 from your perspective -- I want to be clear on
24 this -- when did the waiver occur as to the
25 loss and as to any privilege issues regarding

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1 the loss analysis? Mr. Davis.

2 MR. DAVIS: Your Honor, from the
3 Government's perspective, there was arguably a
4 subject matter waiver that occurred in November
5 of 2018 once we sat down with Mr. Commisso and
6 Mr. Naviloff. Because we clearly discussed the
7 findings that RSM had made regarding loss
8 analysis, including the general sort of
9 categories that included duplicate billing and
10 excessive billing, et cetera.

11 And so in my mind, not that I would have
12 any interest in litigating with United Way, and
13 not that United Way was being uncooperative,
14 but that was a subject matter waiver. And I
15 would guess Mr. Commisso would agree on that.

16 THE COURT: Was it declared understood?
17 Or is that just your -- if you had to litigate
18 it, you'd put it in November 2018, when you
19 started talking about loss analysis,
20 duplicative billing, overbilling?

21 MR. DAVIS: If the question is to me,
22 Judge, I probably don't recall accurately.

23 I don't remember that one of us looked at
24 the other and said, "Okay. This constitutes a
25 waiver."

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1 THE COURT: Sure.

2 MR. DAVIS: Mr. Commisso probably
3 remembers better than I do.

4 THE COURT: Go ahead.

5 MR. DAVIS: Mr. Commisso, do you remember
6 on that point?

7 THE WITNESS: So my memory is similar to
8 yours, which is we didn't have a discussion. I
9 did not, on my own side, brief the issue or
10 determine what it would mean. I do think that
11 the November 2018 meeting was the point where
12 we began to waive the privilege. And it wasn't
13 until later that we had to figure out what that
14 meant. And so in July of 2018, when Naviloff
15 became the Government's expert and
16 Mr. Harrington requested documents, we then had
17 to start figuring out where the lines were.

18 What was the scope of the waiver? And it
19 still -- well, so, it evolved, I guess. We
20 didn't sort it all out in November. And we
21 began to really sort it out in July.

22 THE COURT: July of...

23 THE WITNESS: 2019.

24 THE COURT: 2019.

25 Was there a point at which -- because a

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1 waiver is not a small thing; right?

2 Was there a point at which you
3 acknowledged in your own file, Mr. Commisso, or
4 with your client --

5 Where you said, "Look, our conduct
6 constitutes a waiver. This is going to change
7 the way we produce documents to the
8 Government"?

9 Did that ever get noted anywhere,
10 acknowledged, either internally or externally
11 in your dealings with the Government?

12 THE WITNESS: Internally, certainly, we
13 discussed waiver issues or privilege issues
14 from the beginning and throughout as we made
15 our decisions, and certainly with respect to
16 sharing Naviloff's work in November, and
17 certainly with respect to allowing the
18 Government to hire Naviloff, because I needed
19 to make sure my client understood what that
20 meant.

21 So we evaluated the issue and we made sure
22 we knew what it meant and what the risks would
23 be.

24 THE COURT: But I guess what I want to
25 know is -- let me just -- I think I said very

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1 clearly last week that Mr. Commisso didn't do a
2 thing here, I thought, that was not completely
3 predictable for any lawyer representing a
4 client, or inappropriate, unethical, unlawful,
5 or anything of the sort. There's been a lot of
6 talk about accusations here today. And I guess
7 one could consider -- Mr. Commisso's outraged.
8 Mr. Davis is not happy about it, it's clear.

9 But I certainly don't view this as
10 Mr. Commisso on trial at all. I'm just trying
11 to understand what happened; okay? I can't
12 imagine it would have gone much different with
13 any competent counsel.

14 But is there an acknowledgment -- I mean,
15 is there a day -- a document on which you said
16 to your client, "Listen, we've waived" -- or
17 you wrote in your own file to protect yourself,
18 right, "This is a waiver"? Or you're
19 communicating with the Government?

20 Is there a rubicon -- is there an
21 imaginary line, a date -- some acknowledgement,
22 internally or externally, about a waiver that
23 would change the way you dealt with producing
24 evidence to the Government?

25 THE WITNESS: Yes. So, with respect to

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JOHN COMMISSO

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1 communicating with my client, there are
2 certainly documents -- and I guess I'm
3 hesitating to say too much about it because I
4 need to think about the privileged nature of
5 those communications. But to your point, yes,
6 it is very easy for me, in my file, to
7 pinpoint, because I documented it extensively,
8 exactly how that played out.

9 With respect to communications with RSM, I
10 believe there will be communications between --
11 I'm hesitating a little bit because my memory
12 is vague -- but I expect there would be
13 communications between me and Greg Naviloff.
14 Because Greg Naviloff can't turn over documents
15 or sign a contract with the Government without
16 me acknowledging that the United Way is going
17 to waive the privilege. Because if he does --
18 if he does it without our acknowledgement, he
19 risks having a liability to the United Way for
20 disclosing confidential information.

21 So there's a clear record with my client.
22 There should be a clear record with
23 Mr. Naviloff. With Mr. Davis, I haven't
24 thought about what record may exist, but I know
25 that we talked about the issues. And on

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1 various issues of privilege, he might have
2 asked me things.

3 Or I might have told him, "Before you talk
4 to Mr. Naviloff, I need to make sure that I'm
5 okay with it and my client is okay with it."
6 So there were communications and different
7 types of documentation on these issues.

8 THE COURT: Okay.

9 And if you want to stay with the issue,
10 Mr. Davis, vis--vis your client, your office's
11 dealings with Mr. Commisso or Mr. Naviloff,
12 feel free to develop it more. It's up to you.

13 Q. (By Mr. Davis) So I'll say, Mr. Commisso, once
14 the Government began to deal with RSM and
15 Naviloff as the Government's expert, did you
16 assert any impediment to Mr. Naviloff's sharing
17 fully his work that had occurred, some of it
18 under United Way's contract?

19 A. No. No limitations, no impediment with respect
20 to Naviloff, and the loss analysis, and the
21 work that he was going to do for the
22 Government.

23 Q. So the Government could and did communicate
24 freely with Naviloff after it hired him in July
25 of 2018; correct?

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1 A. Right. And, in fact, my role at that time was
2 essentially something close to zero, unless it
3 dealt with documents that Mr. Harrington
4 needed, or maybe Naviloff and the Government
5 needed that I might be able to provide --
6 United Way documents. But, otherwise, I was
7 not a participant in the Government's
8 relationship with Greg Naviloff.

9 Q. I just have a few more questions. I want to
10 ask you about internal RSM emails; that is,
11 emails within RSM, among the employees of RSM,
12 including Naviloff and other personnel.

13 You've seen those in the posttrial
14 discovery; correct?

15 A. Yes.

16 Q. Did you ever ask for all of those emails to do
17 a comprehensive review prior to trial?

18 A. No.

19 Q. Why not?

20 A. It never occurred to me. I can't think of any
21 reason why I would want them. It just -- it
22 never crossed my mind, and I can't think of a
23 case in 20 years where I may have asked for
24 something like that.

25 THE COURT: That last part of the answer

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JOHN COMMISSO

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1 makes me think I misunderstood the question.

2 What was the question again, Mr. Davis?

3 MR. DAVIS: The question was whether
4 Mr. Commisso requested from RSM all of its
5 internal email communications at any point.

6 THE COURT: Okay. Yeah.

7 MR. DAVIS: May I proceed, Your Honor?

8 THE COURT: Give me a second.

9 No, go ahead. Thank you.

10 Q. (By Mr. Davis) Were there, before the trial in
11 this case, significant requests for some RSM
12 emails from Mr. Alrai?

13 A. Yes, I believe there were.

14 Q. And were there, in fact, RSM emails that were
15 produced, prior to the trial, to Mr. Alrai?

16 A. Yes, there were.

17 Q. And did you play a role in reviewing those
18 emails?

19 A. Yes, if they concerned United Way employees --
20 for example, John Meyer.

21 Q. And were you directly involved in the discovery
22 litigation just before trial -- that is, in the
23 October and November 2019 time frame?

24 A. Yes. Yes, I was.

25 Q. And was it in that context that you filed

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JOHN COMMISSO

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1 **Defense Exhibit A**, your six-page letter that
2 detailed exactly what you were doing in this
3 case?

4 A. Yes, that's exactly right.

5 Q. And in connection with that litigation, did
6 Mr. Harrington, the counsel for Mr. Alrai, ever
7 ask for every internal RSM email in this
8 engagement?

9 A. No, not that I understood, or not that I'm
10 aware of. And that certainly was not the focus
11 of the actual issues being litigated before the
12 Court.

13 Q. And to your knowledge, was any such request --
14 again, for every internal RSM email about this
15 engagement -- was that ever made prior to
16 trial?

17 A. No. The first time it came up was a year
18 later, in August and September of 2020.

19 Q. And in your communications with Mr. Naviloff,
20 at any point, did Mr. Naviloff indicate to you
21 that there might be RSM emails that could be
22 used to impeach him at trial?

23 A. No. We never discussed that.

24 Q. And in your communications with Mr. Naviloff,
25 did Mr. Naviloff ever tell you that there might

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JOHN COMMISSO

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1 be internal RSM emails that contained
2 exculpatory information to benefit Mr. Alrai?

3 A. No, he never told me that.

4 Q. So were you doing anything to suppress or
5 prevent the disclosure of RSM internal emails?

6 A. No.

7 Q. And, in fact, as you said, it never occurred to
8 you to request every RSM email in the
9 investigation; is that right?

10 A. That's right.

11 Q. And just one last question.

12 In dealing with -- well, have you dealt in
13 the past with forensic accounting consultants
14 who may be expert witnesses in litigation?

15 A. Yes, I have.

16 Q. And in any of those engagements, has it ever
17 been part of your practice to collect and
18 review every single internal email at that
19 forensic accounting consultant firm to review?

20 A. No, it's not been part of my practice. And, in
21 fact, it's sort of the last thing that I would
22 ever expect happening.

23 What we do focus on, in civil and criminal
24 litigation, is the -- what I call the raw
25 material, or the original source documents that

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JOHN COMMISSO

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1 go to the expert. And you want to know what
2 those are so that you can then provide them in
3 discovery. But the underlying business records
4 and source documents -- the idea of producing
5 internal emails or internal work product is not
6 something that I've ever been involved in.

7 So, no, I would not have been thinking
8 about it in this case.

9 Q. I want to ask you just briefly about the
10 "fruitful" email, which is Defense Exhibit Gg.

11 Is that something that -- I'm not even
12 sure -- Tracy, if you're on, can we call up
13 Exhibit Gg?

14 MS. UHRIN: Yep. Just give me a moment to
15 share my screen.

16 (Pre-marked Defendant's Exhibit Gg
17 introduced.)

18 Q. (By Mr. Davis) You recognize that email to
19 Mr. Commisso?

20 A. Yes. I've seen this recently.

21 Q. And this is the email that includes the -- at
22 the very bottom, the bullet "the trending of
23 total United Way budget versus IT budget was
24 not fruitful"; do you see that?

25 A. Yes.

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JOHN COMMISSO

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1 Q. Do you recall that in a motion the Defense
2 filed in this case, on page five, in referring
3 to this same email, the Defense said that the
4 "new email revealed a discussion about an
5 earlier version of RSM's report where the RSM
6 team decided to leave out a chart that showed
7 that there was no significant change in IT cost
8 during Alrai's/DigitalNet's tenure because it
9 was not fruitful"; do you recall that being in
10 the motion?

11 A. Yes. Yes, I do.

12 Q. And, of course, Mr. Naviloff being questioned
13 about that same document; do you remember that?

14 A. Right. And I remember the first time I read
15 that motion.

16 And immediately my response was, "No,
17 that's not true."

18 Q. And, in fact, is it true?

19 A. No, it's not true.

20 Q. And why is it not true?

21 A. Well, because if you go to Exhibit Z, which is
22 a report prepared by RSM in October of 2018 --
23 it was presented to the special committee just
24 four days after that email -- and you turn to
25 page, I want to say, 58 and 59, you will see

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1 that there are two charts and a whole lot of
2 narrative about the IT budget and how it
3 changed over time.

4 Q. Right.

5 And included on page 59 of that same
6 exhibit, you recall the sentence that "total
7 functional expenses for United Way and IT
8 expenses each increased by 7 percent over the
9 period FY13 through FY17"; do you recall that?

10 A. Yes, I do.

11 Q. Do you recall further that the same note in the
12 same exhibit at page 59 said that IT
13 expenditures did not grow at a higher rate than
14 total expenses; do you recall that?

15 A. Yes, I do.

16 Q. So was there anything that the RSM team was
17 concealing from the special committee about
18 these facts?

19 A. No. They obviously put the facts in the
20 report. There were two pages of those facts.
21 And as I remember the presentation or
22 understood the point of it, this information
23 helped to explain how Alrai was able to keep
24 the crime going for so long without being
25 detected.

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JOHN COMMISSO

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1 Q. So is the comment about things not being
2 fruitful in Exhibit Gg -- is that part of some
3 deliberate effort to withhold exculpatory
4 information from Mr. Alrai?

5 A. I don't see any evidence of that, and I'm not
6 aware of any effort -- deliberate or joint
7 undertaking, or anything like that, to withhold
8 exculpatory evidence. And I see no evidence of
9 it.

10 Q. So, Mr. Commisso, just to summarize, in your
11 role as United Way counsel in this engagement,
12 have you done anything to suppress evidence,
13 that you're aware of, that's favorable to
14 Mr. Alrai?

15 A. No, I have not.

16 Q. Have you destroyed evidence or failed to
17 preserve evidence in violation of any request
18 or duty that you were aware of?

19 A. No, I have not.

20 Q. Have you selectively produced documents so as
21 to choose documents that harmed Alrai and to
22 hide documents that help him?

23 A. No, I have not.

24 Q. And have you manipulated United Way's privilege
25 so as to deprive the Defendant of evidence that

Excerpt Testimony JOHN COMMISSO

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1 he's entitled to?

2 A. No.

3 MR. DAVIS: No further questions.

4 THE WITNESS: There are two issues that I
5 think need clarification.

6 THE COURT: Well -- okay. Proceed.

7 MS. BROWN: Are you allowing him to make a
8 statement?

9 THE COURT: I would allow him to make a
10 statement, but if you'd prefer to examine him,
11 Attorney Brown, before he does, I'm fine with
12 that.

MS. BROWN: I would prefer to do that.

14 THE COURT: That's perfectly fine, and I
15 should have asked you first. I'm sorry about
16 that.

17 MS. BROWN: Thank you.

18

REDIRECT EXAMINATION

20 BY MS. BROWN:

21 Q. Mr. Commisso, one of the questions the
22 Government asked you was whether you were aware
23 of any documents -- I don't know if you used
24 the word "owned" or "possessed" -- by United
25 Way that were not produced and were

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1 **exculpatory; you remember that question?**

2 A. **Yes.**

3 Q. And so I want to go back to -- you and I
4 discussed this earlier -- is the network scans
5 that were produced in this case. And the
6 Government asked you about it.

7 And as of at least this date, there's been
8 three of them; correct?

9 A. I'm aware of three.

10 Q. But one of those three was produced after
11 trial -- the most recent one?

12 A. **Yes.**

13 Q. And I think I neglected when I was asking you
14 earlier about this -- just for the record, that
15 document is Uuu -- U as in "under" -- and it's
16 actually an Excel spreadsheet.

17 Would you agree with that description of
18 what I'm talking about as to the third network
19 scan?

20 A. I know it's a spreadsheet. I don't know what
21 the exhibit number is, but present whatever you
22 want as the exhibit number.

23 Q. Well, I guess I'm going back to that because as
24 I understood your testimony, you're saying that
25 there was nothing that United Way possessed

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JOHN COMMISSO

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1 that was exculpatory, or even potentially
2 exculpatory, that you, as United Way, did not
3 turn over prior to trial.

4 Did I understand your testimony correctly
5 on that?

6 A. Yeah. I was not aware of anything that we
7 didn't turn over prior to trial that we were
8 required to. And now, after a year of
9 additional discovery, I'm not aware of
10 additional documents that have now been turned
11 over after trial that are exculpatory with
12 respect to United Way's documents.

13 Q. And this is where I'm going with this.

14 That network scan -- we'll refer to it as
15 the "third network scan" produced after
16 trial --

17 A. Yes.

18 Q. -- would you consider that a United Way
19 document?

20 A. I don't know the answer to that because I don't
21 know enough about the history of that document.

22 I can tell you that before trial, I never
23 saw or heard of that document, and that after
24 trial, it was my understanding that RSM
25 produced that document.

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1 Q. In terms of your previous testimony, where at
2 least I understood it that you and RSM had an
3 identical batch of discovery that you had
4 access to, that just wouldn't be true if they
5 produced something after trial that you didn't
6 have; right?

7 A. Well, no, no, they have their own internal RSM
8 documents. You know, if they go on the web and
9 they do some market research where they talk to
10 a different department within RSM, they collect
11 their own documents. I don't have access to
12 them.

13 If they're United Way documents and I
14 provide them to RSM, then I've got my own set
15 and I've provided a set to RSM.

16 Q. But what we're talking about is a network scan
17 of the United Way computer system -- IT
18 system -- in the summer of 2018.

19 You would agree with me, if that's an
20 accurate description of this document, that
21 that's a United Way document; right? No matter
22 where it came from, it originally came from the
23 IT system of the United Way?

24 A. Well, yes. I guess it's a question of
25 possession; right?

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JOHN COMMISSO

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1 So I don't know the history -- the
2 provenance of that electronic file. I don't
3 know who has control over it, where it resides.
4 I know I didn't get it. So I didn't have it in
5 my collection of documents. And I didn't -- as
6 far as I recall, I did not send it to Kroll --
7 to the e-discovery database. And I did not
8 receive it, so I did not send it to RSM.

9 So if it originated at United Way and made
10 its way to RSM, then I don't know how that
11 happened. I was not in the chain of
12 communication in that scenario.

13 Q. And that goes back to my previous question.

14 That when you made the representation to
15 the Court about what documents from United Way
16 were going to be produced, just checking your
17 e-discovery database wouldn't have captured
18 that; correct?

19 A. No, which is why we did additional steps -- we
20 took additional steps.

21 Q. And that's what I was trying to get at before.

22 Those additional steps did not include
23 either picking up the phone or sending an email
24 to Naviloff and saying, "I'm just making this
25 representation to the Court that the Government

Excerpt Testimony
JOHN COMMISSO

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1 and the Defendant have everything that you've
2 reviewed or assessed. Just want to make sure
3 that's true."

4 You didn't do that?

5 A. No, in fact, we did do things like that.

6 So when I say there are multiple things we
7 did to verify, one thing would be for me to
8 contact John Meyer and ask John Meyer, "Do you
9 have these two or three categories of
10 documents?"

11 And another thing that I did is I worked
12 with Greg Naviloff and Chris Fitzgerald. And
13 there are those emails that show that list of,
14 like, 15 folders that they want to discuss with
15 me.

16 And so that was a check on -- that was our
17 way of being comprehensive, so that I could
18 see, "Okay. They've got the four folders that
19 look like documents I gave them, and so I'm
20 confident that I've already produced those four
21 folders." Well, then they've got eight other
22 folders. I don't know what's in those folders,
23 because they control them.

24 And so we're talking through the issues
25 together to see if we missed a United Way

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1 document that I should be aware of that I know
2 that I have to produce it.

3 THE COURT: We need to give the reporter a
4 break.

5 So let's take -- you can continue after
6 this, Attorney Brown, but let's take the
7 15-minute break. We'll reconvene at 11:15.

8 I've got to make a phone call on a case, but
9 I'm going to do it right now so it doesn't drag
10 into beyond 15 minutes.

11 (Recess taken at 10:59 a.m., and the
12 proceedings resumed at 11:16 a.m.)

13 Q. (By Ms. Brown) Before the break, we were
14 talking about this third network scan that was
15 produced post-conviction that you did not -- I
16 want to choose the right word -- have access
17 to, see, or at least was aware of prior to
18 trial; correct?

19 A. I was not aware of it, yes.

20 Q. And I'm going to describe it how I at least
21 view this document, and correct me if your
22 understanding is different.

23 But I am describing it as an Excel
24 document. And at the bottom of it, there are
25 different tabs for -- and I don't even know

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1 what the tech term is for it -- like, different
2 files, but you can access different tabs.

3 If I told you there were 40-plus tabs in
4 this Excel document produced posttrial, would
5 that sound about right?

6 A. It does, but I'm really not familiar with the
7 document, other than I know it exists. So I'm
8 not the best person to investigate the number
9 of tabs.

10 Q. And, again, just for the record, it's -- Uuu is
11 the document that I'm talking about. I just
12 want that to be clear, because it is an
13 exhibit.

14 Well, the reason I ask about it is the
15 Government asked you if you were aware of any
16 documents that came from United Way that were
17 produced after trial that contained either
18 exculpatory or potentially exculpatory
19 evidence. And so it sounds like you're not
20 aware of whether that document contains either
21 exculpatory or potentially exculpatory
22 evidence; would that be a fair assessment?

23 A. That is a fair assessment. And I guess I don't
24 know whether that document ultimately came from
25 the United Way. So I did not have that

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JOHN COMMISSO

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1 document in mind, because I don't know if it
2 came from the United Way and I don't know if it
3 contains exculpatory evidence.

4 Q. But let's just say, hypothetically, it purports
5 to come from United Way at some point.

6 If it purports to be a network scan of the
7 network at United Way at some point in time, at
8 least at some point, it came from United Way;
9 right?

10 A. If it came from John Meyer -- if John Meyer ran
11 the network scan and then he sent that network
12 scan to RSM, which is possible, I would not
13 have received it. I would not have put it in
14 the e-discovery database. I would not have
15 produced it myself.

16 So then, yes, that would come from United
17 Way. If RSM created it, then maybe I would
18 think of that as RSM work product and not a
19 United Way document. It's just -- that's where
20 I make a distinction. I don't know if that
21 distinction matters to you, but there's a
22 difference between United Way's documents that
23 John Meyer creates and RSM work product --
24 something they create as they're doing their
25 work. That's all.

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JOHN COMMISSO

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1 Q. And you would agree with me, if RSM was, for
2 lack of a better word, doing their work, and
3 they were doing that work for United Way
4 through the summer, fall, and early winter
5 2018/2019, those documents really belong to
6 United Way; right? United Way through -- you
7 hired them; right?

8 A. So I think it's a technical issue that I can't
9 say "yes" or "no" to. If they create their own
10 internal work product, then I would not say
11 those are United Way documents. Whether it's a
12 spreadsheet they create, or notes, or a memo
13 that they create for their own internal
14 purposes and they put in their own internal
15 files, I don't consider that, for the purposes
16 of this discussion, to be a United Way
17 document.

18 What I think of when I say a "United Way
19 document" is an email that comes off of our
20 email server, or an invoice, or a contract --
21 something that can be found in the files of the
22 United Way.

23 Q. And as I said, because you haven't really
24 reviewed this network scan, Exhibit Uuu, you
25 can't say that if it did come from United Way,

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1 that it doesn't contain exculpatory evidence?

2 A. I have not reviewed the document. I don't know
3 what it contains. I have a general
4 understanding of the document. And I'm not in
5 a position to draw lines between what's
6 exculpatory and what's not. You've got one
7 definition. I've got -- I'm sure I have a
8 different definition in my mind.

9 Q. Well, we heard on Thursday that anything that
10 relates to the work that RSM did for United
11 Way, if it's going to get produced to the
12 Government, it had to go through you so you
13 could vet it for privileged information.

14 Did I understand that testimony correctly?

15 A. Well, that's probably too broad. But if it
16 relates to Naviloff's loss analysis and relates
17 to his loss analysis for United Way, then I
18 would want to do a privilege review of those
19 documents. If it concerned the Government's
20 work -- Naviloff's work for the Government,
21 then I wouldn't do a privilege review of those
22 documents.

23 Q. Well, what I'm getting at is that there was a
24 much smaller version of this network scan given
25 prior to trial. And what I'm getting at is, if

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1 I understand this process, it would have gone
2 through you for a review to see if it contained
3 privileged information.

4 A. Possibly, although the nature of this document
5 -- I'm not even sure what I would review. It's
6 a report, as I understand it. So one version
7 of it -- the first version of it came from
8 John Meyer. He sent it to me. I looked at it
9 and I produced it in the sense there was some
10 privilege review, but there's really no content
11 that I can review for privilege so -- or
12 produce.

13 Q. Well, it talks about things like passwords and
14 security.

15 I mean, those are things you'd want to be
16 looking at; right?

17 A. That's not attorney-client privilege. That's
18 more confidentiality. That's why we have the
19 protective order in place.

20 Q. But what I'm getting at is that -- and it
21 sounds like you're saying "yes" to this, but I
22 just want to clarify.

23 The much smaller version of this, which
24 was just one tab of this network scan that was
25 produced pretrial -- that came through you

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1 first to do some sort of review for privilege
2 analysis?

3 A. Yes. So let me try to be clear.

4 There were two versions produced before
5 trial. One of them certainly came from
6 John Meyer. I certainly obtained it and
7 reviewed it, and I was responsible for
8 producing it.

9 The second version -- I don't recall, as I
10 sit here right now, who produced that. If
11 John Meyer produced it, that means I produced
12 it. If RSM produced it, then I might not have
13 seen it before trial -- or before it was
14 produced. I just don't know. I just don't
15 recall the chain of custody, or whatever you
16 want to call it, with respect to the second
17 network scan.

18 Q. And as to the third one, did it have to go
19 through you first to be produced, or you've
20 never seen it?

21 A. I think -- I saw it after it was produced. So,
22 no, it didn't go through me before it was
23 produced.

24 MR. HUNTER: Your Honor, I don't mean to
25 interrupt, but if it's helpful, I could proffer

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JOHN COMMISSO

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1 how the Government received these three network
2 scans, if it would help.

3 MS. BROWN: I'm fine with that.

4 THE COURT: You can proffer it, but -- I
5 guess I'm going to have you proffer it so you
6 can -- it might help the witness remember.

7 But after this hearing, I'm going to ask
8 for a timeline to be created about every
9 discovery request, and order, and production,
10 from the beginning of this litigation through
11 where we were now. Because there's just too
12 much to keep track of and too much to
13 distinguish from.

14 By the way, Mr. Commisso has answered, I
15 thought, very appropriately a minute ago when
16 he said, "Look, what you think is exculpatory
17 is different things." It's a very reasonable
18 position.

19 But that's why I didn't understand the
20 questions from the prosecution about "did you
21 withhold exculpatory evidence?"

22 That's not for the witness to decide.
23 That's not for anyone to decide except me. And
24 although I do appreciate the distinction, and
25 it's very important, between United Way

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1 documents and RSM work product -- because I
2 don't think there was a discovery allegation to
3 produce RSM work product, except possibly a
4 Brady obligation.

5 But it's a very fuzzy, gray area here,
6 because there's a question about whether the
7 prosecutors would have thought of it or had
8 the -- it's just not a normal situation. We've
9 got to explore it and we're -- frankly, we're
10 spending way more time on -- for three days --
11 and I know you have a burden to meet,
12 Ms. Brown. This is not a criticism.

13 But we're spending tons of time on RSM,
14 and United Way, and their counsel, when I think
15 the real questions here are for the
16 prosecutors. That's what I think. And I don't
17 know when we're going to -- I guess I'm just
18 going to have some questions for them myself.
19 I don't plan on putting anybody on the witness
20 stand, but you're all officers of the court.
21 And I know you're going to answer me
22 truthfully, but that's what the real questions
23 are here.

24 Because there's a difference between
25 Mr. Commisso representing a victim and how he

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1 would approach issues, and how he would
2 approach them if he was, frankly, defending an
3 accused. It's not really the same thing.

4 So go ahead and make your proffer,
5 Mr. Hunter. And try to make it succinct and
6 clear, please.

7 MR. HUNTER: I will. And if the Court has
8 questions later or after this witness, I can
9 fill in.

10 But in essence, before trial,
11 Mr. Harrington is requesting information about
12 the IT environment. We learned that John Meyer
13 had run a network scan, and that there might
14 also be a network scan that RSM had. We asked
15 for them and we got them. One was a 62-page
16 PDF that was produced before trial. The other
17 is this one-page Excel spreadsheet that
18 Ms. Brown is referring to.

19 During this litigation -- and I make a
20 note of it in our surreply, I think -- during a
21 discussion with RSM, we realized that the
22 one-tabbed Excel spreadsheet was only part of
23 the larger scan that they did. And so I asked
24 for it. They produced it to us. And we
25 produced it to the Defense. And my

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1 understanding was -- because through the
2 pretrial proceedings, our understanding was we
3 had received all network scans and had produced
4 them. So when I learned there was this larger
5 network scan that RSM had, we produced them.

6 And that's the basic understanding of
7 where the Government got them and the timeline
8 of production. There were two produced before
9 trial. And this one larger one, we produced
10 after trial as soon as we learned about it.

11 THE COURT: Thank you.

12 MS. BROWN: Thank you, Your Honor, for
13 clarifying that.

14 Q. (By Ms. Brown) And during your questioning by
15 Attorney Davis, if I understood this correctly
16 or wrote it down correctly, I understood that
17 you said that prior to trial, you did not
18 assert a privilege as to the work done by
19 Mr. Naviloff; did I understand that answer
20 correctly?

21 A. Well, we had waived the privilege with respect
22 to the loss analysis -- Mr. Naviloff's loss
23 analysis. So at that point, there was no more
24 privilege. But we also hadn't litigated the
25 scope of that. So I guess I'm not sure what --

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1 well, maybe you have another question.

2 Q. I do. I didn't want to misstate what you had
3 said. So I wanted to understand what you said
4 first, and it sounds like I did understand it
5 correctly.

6 My question as a follow-up to that was you
7 would agree with me, and I'm not going to go
8 through it all again -- we talked about this
9 last week -- there were several emails
10 involving Mr. Naviloff's loss analysis that you
11 had redacted because you felt they also
12 contained information relative to data
13 security, and we brought some of those up on
14 the screen last week that were emails that were
15 produced.

16 So they weren't held back under the
17 privilege log, but they had a notation of
18 "redacted" on them. You remember there were
19 some of those emails last week; right?

20 A. Yeah. So you're now -- there's some moving
21 parts there.

22 So you first asked me a question about
23 before trial; right? And about the use of
24 privilege before trial. But now when you're
25 talking about those redacted documents, those

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1 are all produced in August and September, maybe
2 October, of the year after trial; right? So I
3 just want to make sure we're talking about the
4 same period of time and the same --

5 Q. Correct.

6 I guess my question is that you're still
7 asserting the privilege as to some of the
8 emails involving Mr. Naviloff; correct?

9 A. The portion of those emails that contain
10 information that is only related to the data
11 security investigation.

12 Q. But you're still asserting privilege as to some
13 of the emails involving Mr. Naviloff?

14 A. Yes.

15 Q. And, in fact, we talked about it last week --
16 let me get the document number -- the privilege
17 log that was produced after trial -- many, if
18 not most, of those emails also have
19 Mr. Naviloff's name either -- that it's to him
20 or he's cc'ed on those emails.

21 So you are still asserting some form of
22 privilege as to emails involving Greg Naviloff;
23 correct?

24 A. Yes, because the scope of the Judge's order was
25 to produce only those documents related to

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1 Naviloff's loss analysis. And, in addition to
2 that, I had to redact or withhold privileged
3 information regarding the data security
4 investigation.

5 Q. Well, I just wanted to -- it wasn't clear from
6 the question from Attorney Davis.

7 But I wanted to clarify that you are still
8 asserting privilege as to some of the work
9 Naviloff did in this case in terms of emails
10 relating to his discussion of this case with
11 his team members at RSM.

12 A. Yes, but I just want to make sure we're clear.

13 The content of those privileged documents
14 do not relate to the loss analysis.

15 Q. And that's as to the documents that are in the
16 privilege log; right?

17 A. And also the ones that have been marked as
18 redacted.

19 And I also want to make clear -- there is
20 no motion, or letter, or any other
21 communication where you have challenged any of
22 those redactions that you showed me the other
23 day.

24 Q. You would agree with me, it's hard to tell it's
25 a redaction if you can't see the document,

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1 isn't it?

2 A. Well, you challenged the privilege log. And so
3 you could -- I'm not going to tell you how to
4 do your job, but there are things that you
5 could do.

6 Q. Now, Attorney Davis -- and my notes indicate he
7 asked you the question that you have never
8 produced data breach investigation to the
9 Government; do you remember that question?

10 A. We have always asserted the privilege with
11 respect to the data security investigation.
12 And, therefore, we have never produced or
13 disclosed any documents concerning the data
14 security investigation.

15 Q. But we now know, because of your assertion of
16 the privilege on this, that Naviloff, in some
17 way, shape, or form, had access to information
18 relative to the data breach investigation,
19 because you've asserted privilege as to his
20 emails regarding this?

21 A. So, correct, he was on emails that -- he was on
22 emails that contained privileged information
23 regarding the data security investigation. He
24 was not part of the DFIR team, but the two
25 teams both worked at RSM. And, sometimes, two

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1 teams were together on the same emails.

2 Q. Now, one of the questions -- the -- well,
3 actually, I forgot to come back to this. I had
4 one more question regarding the network scan we
5 were talking about, which is document Uuu.

6 Do you recall being on an email exchange
7 where this network scan was discussed?

8 A. No, I don't remember that email.

9 Q. If I told you there was an email from
10 August 13, 2018, where you were copied, where
11 the subject line is "additional network device
12 scan, privileged and confidential," you don't
13 have a recollection of that email?

14 A. I do recall emails in August of 2018 about the
15 network scan. I just -- yes, I recall,
16 generally, there were emails.

17 Q. And so you may have had access to the network
18 scan, being on this email chain back in August
19 -- between August 13 and August 15 of 2018?

20 A. I had access to that email discussion. I did
21 not have access to the network scan.

22 Q. So if there were an email from Ryan Gilpin
23 where he put a link into the scan saying, "You
24 could navigate here," and then has the
25 hyperlink, "and download and run and file and

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- 1 screenshot below," you don't remember him
2 sending a link to access that network scan?
- 3 A. He sent that to John Meyer at the time. I had
4 no memory -- paid no attention to it. I only
5 know about it because I've seen it over the
6 last week or two.
- 7 Q. And so -- you're correct. So that's an email
8 chain between Ryan Gilpin and John Meyer.
9 And you and several other members of RSM
10 are on that chain; correct?
- 11 A. I don't have it in front of me.
- 12 Q. One of the questions Attorney Davis asked you
13 is whether trial counsel specifically asked
14 for, and to quote Attorney Davis, "every single
15 internal email from RSM."
16 And you answered "no," that trial counsel
17 did not ask for that.
18 Remember that exchange?
- 19 A. Yes.
- 20 Q. Do you remember Defense counsel prior to trial
21 asking for all documents and data collected and
22 reviewed by RSM in calculating United Way's
23 loss?
- 24 A. That sounds similar to the language in one of
25 the discovery requests.

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1 Q. In fact, that -- it wasn't one of the discovery
2 requests, but it's also in the actual motion to
3 exclude Naviloff, document 27, page two.

4 And do you also remember that trial
5 counsel also asked for any reports prepared by
6 Mr. Naviloff, RSM, and its employees?

7 A. So with respect to those two issues, what I
8 remember is I had -- I had a duty or a role,
9 which was to focus on United Way's documents.
10 So with respect to your first question about
11 RSM emails, I don't really have much knowledge
12 or more to say that I haven't already said,
13 because I was focused on United Way's
14 documents.

15 And on the second part of what you said,
16 he -- I don't think you read the entire
17 request. Because what I remember is he was
18 looking for reports that RSM had prepared
19 regarding the loss analysis for United Way.
20 And so from my side focused on United Way's
21 documents, what I was focused on was the
22 reports that were for United Way.

23 And I guess the distinction I'm making is,
24 if they prepared a report that they use
25 internally, well, that -- I didn't get that.

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1 That was not for the United Way. But if they
2 put together a PowerPoint presentation for a
3 report to the special committee, that was a
4 report for the United Way. And they also
5 helped with the insurance claim, so that was a
6 report for the United Way. And, in fact, those
7 are the documents that I produced in response
8 to Mr. Harrington's request.

9 Q. Well, I guess if I understood your testimony
10 earlier, you were saying that once Mr. Naviloff
11 started talking to the Government in November
12 of 2018, anything relative to Naviloff or RSM's
13 loss calculation -- there's no more privilege.
14 It was gone. Because as Naviloff testified at
15 trial, he basically took his loss calculation
16 from RSM and carried it over to his work for
17 the Government. So there wouldn't be any
18 distinction as to documents -- whether they
19 were for RSM's loss calculation or for the
20 Government's loss calculation.

21 As I understood your testimony, the
22 privilege didn't exist anymore as to the loss
23 calculation for RSM; is that right?

24 A. I'm confused. I'm not sure what you want me to
25 respond to. I'm sorry. I'm just confused.

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1 Q. Well, I was asking about the fact that you said
2 that the trial counsel didn't specifically use
3 the word "internal" emails. And I will agree
4 with you that trial counsel did not use that
5 specific term.

6 But trial counsel did ask for reports
7 prepared by Mr. Naviloff, RSM, and its
8 employees, relative to RSM's investigation of
9 the loss resulting from Alrai's alleged
10 fraudulent conduct. And the answer, as I
11 understood it, was you thought they were only
12 talking about work that involved United Way.

13 But what I'm pointing out to you is that
14 you're saying that there's no distinction; it's
15 the same analysis as to the loss calculation.

16 A. You mean whether it was for the United Way or
17 for the Government?

18 Q. Correct.

19 A. Yeah, so I think we may have talked past each
20 other a little bit. I was just trying to make
21 a point that as it concerned me, Mr. Harrington
22 wanted copies of reports that Naviloff prepared
23 for the United Way.

24 And so I had to think "okay. What reports
25 did Naviloff prepare for the United Way?"

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1 Well, I know there were two that went to the
2 special committee. I know that there was one
3 that was a draft that ended up going to the
4 insurance company. And I'm sure there may have
5 been others.

6 But that's what I was thinking in response
7 to that, which is "what are the reports of the
8 loss that Naviloff prepared for the United
9 Way?"

10 Q. Well, you spoke earlier that there might be
11 internal documents at RSM. Like, they may have
12 created a spreadsheet.

13 And that still is work that was done for
14 United Way, because you had hired RSM; right?

15 A. But if you look at -- do you have
16 Mr. Harrington's requests?

17 Q. I have it at document 47. And what I'm reading
18 from that is what he basically does from
19 document 47, which is his -- Defendant's motion
20 to exclude expert testimony.

21 The first three or four pages, he
22 summarizes -- and maybe this is a good start on
23 what the Judge is requesting later -- Attorney
24 Harrington basically does a history up until
25 this point of both his requests for discovery

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1 and the Government's response to that
2 discovery. So I was reading from that
3 document, specifically on page two, paragraph
4 six.

5 And so that -- I guess the point I was
6 asking you about was that discovery isn't a
7 matter of "Simony says." They don't have to
8 use the exact word to invoke you having to turn
9 it over. The spirit of that request was that
10 Attorney Harrington was trying to get to the
11 basis for the opinions of Naviloff.

12 That's what he was attempting to get to --
13 were their internal reports, where their
14 analysis -- he didn't have to use all those
15 magic words, or the magic word "email" to get
16 to what's the basis of Naviloff's opinion.

17 And you understood that; right? You
18 understood that that's where Attorney
19 Harrington was trying to get to -- was what was
20 the basis of Naviloff's opinions; right?

21 A. Yes. So I understood his requests -- he was
22 trying to get to the original source documents;
23 right? RSM gathered up all of this data, and a
24 lot of that were United Way's documents. So
25 that he wanted United Way's documents that were

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1 accessed, reviewed, relied on by Naviloff with
2 respect to loss analysis. I understood that.

3 Q. And as I said, I just read to you paragraph 6A
4 which says "all reports prepared by
5 Mr. Naviloff, RSM, and its employees,
6 collectively referred to as 'RSM,' relative to
7 RSM's investigation of the loss resulting from
8 Alrai's alleged fraudulent conduct."

9 That does not limit it to documents in the
10 possession of United Way, does it?

11 A. No, but for purposes of my responding to it,
12 I'm only responsible for documents in the
13 possession of United Way.

14 Q. But you've asserted privilege as to documents
15 that were created and possessed by RSM?

16 A. With respect to the data security analysis.

17 Q. But my question is, you've asserted privilege
18 as to documents created and possessed by RSM?

19 A. Yes. Yes, I have, for certain documents -- for
20 certain categories of documents.

21 Q. So in some way, you are responsible for
22 documents from RSM, especially if they were
23 created while they were working for United Way
24 -- you're responsible for whether those
25 documents get to the Defendant?

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JOHN COMMISSO

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1 A. Yeah, I don't agree with that.

2 THE COURT: Well, is it more "responsible"
3 you're focused on?

4 Q. (By Ms. Brown) Yeah, I guess I could rephrase
5 that.

6 You have some control over whether a
7 document gets to the Defendant?

8 A. I have -- through asserting of privilege, and
9 providing a privilege log, and asking RSM not
10 to turn the documents over, yes. That's my
11 role.

12 Q. And I just have one final question.

13 Going back to the beginning of the case,
14 late May through June of '18, at any point
15 during that time, did any of the government
16 agents, either being FBI agents or the U.S.
17 Attorney's Office, ask you to preserve any
18 data, IT environment -- anything along those
19 lines? Were you asked by the Government to
20 preserve anything relative to this case?

21 A. Were we asked to preserve anything? I don't --
22 bear with me, because it's been two-and-a-half
23 years.

24 We were asked for things. I guess the
25 short answer to your question is I don't

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1 remember, but I can tell you what happened,
2 which is we were asked for things. So in a
3 sense, that, I would say, is a server request
4 for preservation -- you know, when they say
5 they want us to produce certain types of
6 documents, we obviously preserve them.

7 And I know that I had discussions early on
8 where I described the types of things that we
9 were doing, like the fact that we were
10 collecting laptop computers, and cellphones,
11 and things like that. And, in fact, we sent
12 them to a third party, Stoneturn Group. And
13 then we had arrangements for an FBI agent to
14 obtain those images from Stoneturn Group.

15 So I don't remember any specific requests
16 for preservation, but I do remember periodic
17 discussions about what the Government may be
18 looking for and what we were doing to preserve,
19 collect, review, and produce the evidence.

20 Q. And did you ever receive a request from the
21 Government -- and, again, focusing on this
22 period of time of late May through June of
23 2018 -- did you ever receive a request to
24 preserve, like, network scans, or preserve the
25 IT environment as it existed at the time

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1 Mr. Alrai either worked there or shortly after
2 he worked there?

3 A. Can you just say that -- sorry.
4 Say that one more time.

5 Q. Sure.

6 Again, focusing on the time of June of
7 2018, when Mr. Alrai left the employ of United
8 Way, did the Government -- and by "the
9 Government," I mean the FBI or the U.S.
10 Attorney's Office -- did they ever make any
11 requests that you preserve network scans or IT
12 environment?

13 A. No, not in those words, no. To date, the
14 Defendant has not made a formal request that I
15 preserve the entire IT environment or network
16 scans.

17 Q. And you -- strike that.

18 As I understood your answer, it sounded
19 like the way you were responding to the
20 subpoena was on, for lack of a better word, a
21 document-by-document request.

22 A. No, I guess I wouldn't describe it that way. I
23 would say we did it on a rolling basis. It was
24 an enormous undertaking, and we searched
25 comprehensively and exhaustively. And then we

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1 produced relevant documents on a rolling basis.

2 THE COURT: What does "relevant" mean to
3 you? I mean, I don't understand how you have a
4 role in determining that. I mean, it's
5 discovery. What's relevant to an expert is the
6 expert's eyeballs at every side. That's how I
7 view it.

8 Now, I realize in a civil litigation --
9 and in criminal too -- internal conversations
10 might not necessarily be subject to production.
11 And it doesn't appear that that was required
12 here, because no one set that forth and agreed
13 to it. But you keep invoking relevancy in a
14 way that -- and earlier in this litigation, we
15 had conversation about what the expert relied
16 on. What the expert relied on is what the
17 expert saw -- period. Because choosing not to
18 rely on it is a decision that's very important
19 vis-`-vis an expert's competence and bias.
20 It's crucial information what an expert decides
21 not to rely on, if the expert saw it.

22 And it sounds like someone was making
23 determinations here before -- before the
24 posttrial orders, I mean -- it sounds like
25 someone was making determinations here about

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1 what was appropriate and whether or not
2 Mr. Naviloff relied on it based on whether he
3 actually cited it or discussed it. And from my
4 perspective, that's just not the standard.

5 Do you understand what I'm saying?

6 THE WITNESS: Yes, but I guess there are
7 two different issues. One issue is -- three
8 issues. My internal investigation, the
9 Government's investigation, and the response to
10 the grand jury subpoena. And then there's
11 Naviloff's investigation; right?

12 So Naviloff and RSM determine what's
13 relevant; right? And my job in sort of
14 overseeing their work is to make sure they have
15 access to what they want.

16 Because if somebody says, "Don't let them
17 look in that room over there," or, "Don't let
18 them talk to those three witnesses," now we no
19 longer have a fair and independent
20 investigation; right? So when it comes to
21 Naviloff requesting information, Naviloff asked
22 for what we thought he needed or wanted. So
23 that's one.

24 With respect to my investigation, and that
25 is directly related also to producing documents

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1 to the Government, I would say it's guided by
2 all of my experience as a civil and as a
3 criminal defense litigator. You start with an
4 enormous amount of data. You can't review it
5 all. You can't produce it all. And so you end
6 up with this funnel effect as you're trying to
7 narrow it down to a reasonable number of
8 documents. And you use very sophisticated
9 tools in 2018 that help you find the best
10 documents with the least amount of effort.

11 THE COURT: That's two. You said there
12 were three.

13 THE WITNESS: I said we had Naviloff.

14 THE COURT: Oh. Naviloff, you, and the
15 Government.

16 THE WITNESS: And the Government.

17 THE COURT: I respectfully just
18 observed -- and I mean this respectfully,
19 because it's not meant to be a challenge, but I
20 don't understand how any of that addresses what
21 I just asked you.

22 THE WITNESS: So you want to know how do I
23 determine relevance?

24 THE COURT: No, I don't. I don't. It's
25 okay.

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1 You can continue with your questions,
2 Attorney Brown.

3 MS. BROWN: That was actually my last
4 question, Your Honor. And I don't have any
5 follow-up based on the Court's questions.

6 So I don't know if the Government has
7 recross, but I don't have any other questions.

8 MR. HUNTER: Briefly, Your Honor. I'll
9 try to hone in, I think, on what the Court's
10 concern was.

11
12 RECROSS-EXAMINATION

13 BY MR. HUNTER:

14 Q. So, Mr. Commisso, you were -- the Court raised
15 a concern about wanting every document that
16 Mr. Naviloff saw. So that way, the Defense
17 could assess the relevancy determinations that
18 Mr. Naviloff made. And Defense counsel asked
19 you some questions related to this.

20 And so with respect to the e-discovery
21 database which you were talking about --
22 actually, I'll -- with the e-discovery
23 database -- from that database, you made
24 productions to the Government in response to
25 the grand jury subpoena; is that right?

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1 A. Yes, that's correct.

2 Q. And in relation to this pretrial litigation
3 about Mr. Naviloff, Mr. Harrington was seeking
4 documents related to Greg Naviloff's expert
5 testimony; do you recall that?

6 A. Yes.

7 Q. And in order to identify every document in the
8 United Way e-discovery database that
9 Greg Naviloff could possibly have looked at,
10 did you work with Kroll to identify those
11 documents?

12 A. Yes, every single one of them, without making a
13 determination if it was relevant or not. We
14 just turned it over.

15 Q. And I just want to talk a little bit about how
16 the e-discovery database worked, as it's
17 relevant to that issue.

18 Did everyone who had access to this
19 e-discovery database have unique log-in
20 credentials?

21 A. Yes, everyone from RSM had unique log-in
22 credentials. And the system tracked every time
23 an RSM employee accessed a document in the
24 system.

25 Q. And you addressed this in your letter when

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1 Defense counsel asked you some questions about
2 it, but is the work you did with Kroll pretrial
3 related to this motion to exclude
4 Greg Naviloff? Did you work with Kroll to
5 identify every document in the database that
6 anyone with an RSM log-in credential had
7 clicked on, viewed, accessed, et cetera?

8 A. Yes, and then we produced the few documents
9 that needed to be produced as a result of that.

10 Q. So going to the Court's question, you did an
11 initial review in response to the grand jury
12 subpoena where you tried to identify,
13 basically, all the documents relevant to this,
14 the Imran Alrai case, to put it simply?

15 A. Yes.

16 Q. And then this second search that you did was a
17 little more technical, where you tried to
18 identify every document in that database that
19 somebody from RSM had clicked on, or looked at,
20 or viewed, or accessed?

21 A. Yes.

22 THE COURT: Wait a minute.

23 This second one you're talking about,
24 Mr. Hunter -- which one is that? Is that the
25 one after Mr. Harrington's motion to exclude

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1 Mr. Naviloff?

2 MR. HUNTER: Yes, Your Honor. I'll
3 clarify.

4 Q. (By Mr. Hunter) So when you reactivated the
5 database after Mr. Harrington filed his motion
6 to exclude Greg Naviloff's testimony,
7 Mr. Commisso, was that when you undertook the
8 effort to identify any as-yet-non-produced
9 documents?

10 THE COURT: You froze. Mr. Hunter froze;
11 right? This is really the first hearing I've
12 had, I think, since we've been Zooming hearings
13 starting -- I think it was in April -- where
14 we've had this many problems.

15 THE WITNESS: Yeah.

16 THE COURT: I'm sure Mr. Hunter can hear
17 us talking, but he knows that we're not hearing
18 him. Oh. He's gone.

19 THE CLERK: He actually dropped off a few
20 times this morning, Judge, as well.

21 THE WITNESS: There were two issues that I
22 wanted to clarify, if I can get the time to do
23 that.

24 THE COURT: Well, I'm happy to listen to
25 you, but the attorney conducting your cross is

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1 not in on the hearing. So I don't know if that
2 makes a difference to the Government's counsel
3 or not, if we want to let Mr. Davis -- look, I
4 have some questions for you too --

5 MR. DAVIS: So, Judge, I think Ms. Le and
6 I can handle the rest of it. And I apologize
7 for having to break.

8 Are we still on redirect now? Or are we
9 on recross?

10 THE COURT: Yeah, we're on recross. Yes.

11 MR. LE: Hey, Judge, can we do what you
12 were suggesting before -- we were just having a
13 break at 12:00. Hopefully -- maybe Mr. Hunter
14 can go into the office. Because I think the
15 next witness is his witness to cross, if
16 necessary. Oh, look.

17 Mr. Hunter's back on.

18 THE COURT: So we're on recross,
19 Mr. Davis.

20 Go ahead, Mr. Hunter. Try your question
21 again.

22 MR. HUNTER: I'm sorry about that. I lost
23 power briefly.

24 Q. (By Mr. Hunter) So, Mr. Comisso, trying to
25 recall where I left off.

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1 So after Mr. Harrington -- this is in the
2 context of after you reactivated the
3 e-discovery database when Mr. Harrington had
4 moved to exclude Greg Naviloff's testify.

5 At that point, did you work with your
6 e-discovery vendor, Kroll, to identify every
7 document in the database that someone with an
8 RSM credential had clicked on, or looked at, or
9 accessed?

10 THE COURT: Yeah, but you already asked
11 him that, Mr. Hunter.

12 And what I asked you was "what are you
13 talking about?"

14 Because you called it "the second time."
15 And I think you're trying to refer to not the
16 original grand jury production, but the time
17 immediately after the motion to exclude
18 Naviloff, where we resolved it rather than
19 excluding Naviloff by producing discovery;
20 right?

21 MR. HUNTER: Yes.

22 THE COURT: Okay. But you're talking
23 about things like e-discovery databases and
24 things that aren't going to have much -- we've
25 got to talk about criminal procedure and

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1 production. How you get there is interesting,
2 I guess, to somebody, but I need to
3 understand -- we're having documents produced
4 in response to a motion to exclude an expert.
5 And then there were other documents produced
6 after the trial was over; right?

7 I think what you're trying to establish --
8 tell me if I'm not understanding. The point
9 you're trying to make is that that second
10 production -- not the grand jury production,
11 but the pretrial production -- produced every
12 United Way document that anybody from RSM laid
13 eyes on; is that what you're trying to
14 establish?

15 MR. HUNTER: Yes. Every document in that
16 collection in the database, Your Honor.

17 And the broader point that I'm --

18 THE COURT: What's that mean, "in that
19 collection in the database"? What's that mean?

20 MR. HUNTER: So I believe Mr. Commisso has
21 testified to this. That as part of his
22 internal investigation, he put together a large
23 e-discovery database of documents collected
24 from email accounts, from virtual desktop
25 images, from United Way's records, that RSM

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1 then had access to for their analysis and he
2 used for his internal investigation and to
3 respond to the grand jury subpoena.

4 And the reason why I was asking these
5 questions is because the Court inquired about
6 how Mr. Commisso made a relevancy
7 determination, and in particular raised a
8 concern about -- regarding expert discovery.
9 The standard being, wanting to provide every
10 document that the expert laid eyes on. And so
11 what I was trying to do was at least put on the
12 record the efforts that were made to identify
13 those documents and produce them.

14 THE COURT: Okay.

15 But don't you understand that that plays
16 right -- that doesn't necessarily help you,
17 because what you're saying is a lawyer for the
18 victim decided what's relevant to produce. And
19 that's, like, the whole point of the motion.
20 And if that's supposed to make me feel
21 better -- I guess it makes me understand more,
22 but it's -- and the problem is -- it isn't that
23 I'm questioning the relevancy determinations.

24 The point is that someone needs to be
25 accountable and cross-examinable in a trial for

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1 that. That's how this works. It's not
2 about -- that I question Mr. Commisso's
3 judgment or even motives. It's just that that
4 has to be something that everybody understands
5 during a trial.

6 And it isn't particularly helpful to say
7 after the fact, "Oh, none of this mattered.
8 None of this was relevant." It's a difficult
9 thing to know. That's up to a trier of fact --
10 that's me in this case -- and I don't know. I
11 just keep venting like this at you guys, and I
12 know it doesn't help you.

13 You can continue with it, but I wasn't
14 questioning Mr. Commisso's definition of
15 relevancy. I was more questioning the fact
16 that he was even making a determination to
17 begin with of -- how that really is justified;
18 right?

19 It's a criminal prosecution. And the
20 victims in any criminal case produce evidence,
21 sometimes, pursuant to a grand jury subpoena.
22 But when you have someone in the process that
23 might have motives that could -- not improper
24 motives, but motives that a trier of fact
25 should be exposed to, that matters. And it's

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1 very difficult to make this determination with
2 this. Let me ask this question.

3 And I say "it's difficult to make this
4 determination." It's harder to keep track of
5 all the different permutations of what was
6 produced here at different times. I mentioned
7 earlier to Mr. Davis -- you might have been off
8 at the other hearing -- I mentioned of
9 requesting a timeline. But I don't want to
10 make you do busywork and waste your time.

11 Is there a document that I already have
12 that kind of -- you're nodding, Ms. Le -- that
13 kind of lays this out? Because you were just
14 referring to it in the testimony, I know.

15 What would that be?

16 MS. BROWN: Well, I referred to document
17 47, which is the motion to exclude Naviloff's
18 testimony filed by Attorney Harrington.

19 So as a prelude to his request to exclude
20 Naviloff, he documents the history of the
21 discovery process, especially as it pertains to
22 Mr. Naviloff. So he talks about -- they're
23 notified when they get the report. There's
24 back-and-forth. And I don't have that, but I
25 think there's even the letters -- or emails

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1 that are in there, but Attorney Harrington's
2 document 47 documents the history up until the
3 time of the filing of that motion.

4 And then if you look at the two motions
5 that are responsive, which is document 50 and
6 51, then I think that even picks up on, like --
7 because I know from document 51, the Government
8 talks about the chambers conference, and what
9 happened in the chambers conference.

10 So if you put those three documents
11 together -- 47, 50, and 51 -- it gives a pretty
12 good timeline of what was happening.

13 THE COURT: Through when?

14 MS. BROWN: One's 52 -- I want to say this
15 all is going on through October, November. It
16 was all pretrial.

17 THE COURT: Yeah. And, see, I want the
18 big picture.

19 Go ahead, Ms. Le.

20 MR. LE: And I know this because I wrote
21 this part of the Government's response, Your
22 Honor.

23 So record document 170 -- and this
24 follows -- if you go to page five, starting at
25 page five and onto page six, I prepared the

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1 charts about the posttrial discovery and the
2 Court's order. We have listed for the Court
3 dates that we received certain records and
4 dates that we provided those records to Defense
5 counsel, including the Bates number, as well as
6 the descriptions of the contents of the
7 posttrial discovery.

8 Which I think is what the Court is
9 concerned about; right, Judge?

10 THE COURT: Yeah. Yes. I'm going to look
11 at that, though, because I really don't want to
12 create busywork for you guys just to have you
13 file more stuff. You're very busy as it is,
14 and you've worked hard on this.

15 I'm going to look at these documents and
16 determine if they tell me what I want to know
17 before I make you do anything else.

18 MR. LE: And it might help the Court when
19 you go back and look at certain of the
20 exhibits -- we did list all the Bates numbers
21 by sequence. So if the Court has a particular
22 document that is a concern that was produced
23 posttrial, in our pleading on page six through
24 seven --

25 THE COURT: What's your pleading -- 170?

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1 MR. LE: 170, Your Honor. That is our
2 objection to Defendant's motion to dismiss.
3 That was filed September 23, 2020. And it goes
4 through the history of the Court's discovery
5 order and our litigation regarding discovery.

6 And when we created these charts, we did
7 that by documenting our production, including
8 when we received information from either RSM or
9 United Way, the Bates sequence, as well as a
10 description. So that that might help the Court
11 if you're going to go back and compare the
12 exhibits that Counsel has submitted during this
13 litigation.

14 THE COURT: Thanks.

15 Look, Judge Johnson is trying to reach me
16 about something that we've got to deal with,
17 like, right now. So I'm going to have to
18 suspend this. It's 12:11.

19 We will resume at 1:15; okay?

20 (Recess taken at 12:11 p.m., and the
21 proceedings resumed at 1:17 p.m.)

22 THE COURT: All right.

23 Let's resume, please.

24 MR. HUNTER: No further questions from the
25 Government.

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JOHN COMMISSO

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1 THE COURT: Okay.

2 Attorney Brown?

3

4 REDIRECT EXAMINATION

5 Q. I just want to clarify something,
6 Attorney Commisso.

7 You were asked questions about this
8 e-discovery database. I think we already
9 established earlier that this e-discovery
10 database, we now know, didn't have everything
11 that RSM had access to?

12 A. That's correct.

13 MS. BROWN: That's my question.

14 THE WITNESS: Okay.

15 THE COURT: And, Mr. Commisso, you said
16 you wanted to clarify a couple of things. And
17 even though it's unusual, I know you were
18 admitted pro hac vice, so I want to give you an
19 opportunity to do that.

20 THE WITNESS: Okay. And, really, I think
21 it's just one thing.

22 I gave an answer last Thursday.

23 The answer I gave was "we were all working
24 together." And as soon as I said those words,
25 I knew that it needed clarification. I believe

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1 the context was pretrial discovery.

2 So after Mr. Naviloff was hired by the
3 Government, and after Mr. Harrington had
4 submitted requests for certain discovery
5 concerning Mr. Naviloff, there was a series of
6 email messages. I don't remember the exact
7 exhibits. I don't remember the exact question.
8 But I do know what I meant by my testimony when
9 I said we were all working together.

10 As I've explained, I was responsible for
11 producing United Way's documents and for
12 protecting United Way's privilege. And so I
13 had conversations with Greg Naviloff and others
14 at RSM. I had conversations with Mr. Davis and
15 others in the U.S. Attorney's Office. And, I
16 guess, in a sense together, we were working to
17 identify and produce documents, to the extent
18 that we could, in response to Mr. Harrington's
19 pretrial discovery request.

20 So I didn't want to just leave that
21 answer, "we were all working together," hanging
22 out there as something having bigger meaning
23 than I had intended.

24 THE COURT: Okay. That's understood. I
25 hadn't seized on it in any kind of way like

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1 that, but I understand your point. Let me ask
2 you this question.

3 You brought this case -- I think it was
4 you, personally, right, to the U.S. Attorney's
5 Office in Boston before the New Hampshire
6 office accepted it? At least that's what some
7 of the briefing says.

8 Were you involved in that?

9 THE WITNESS: I contacted the U.S.
10 Attorney's Office in Boston twice. And before
11 we really got into a discussion, a prosecutor
12 in Boston notified me that the case was already
13 active in New Hampshire, and I was introduced
14 to Mr. Davis.

15 THE COURT: Oh. All right.

16 So what I've read -- that they twice
17 declined prosecution -- is that inaccurate?

18 THE WITNESS: I can only tell you my
19 understanding. My first call to the U.S.
20 Attorney's Office in Boston, I asked some
21 questions and I did not identify my client. So
22 there was no -- in the first call, there was no
23 declination. There was just a discussion about
24 some issues in general without identifying a
25 client.

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1 In the second call, I called and said,
2 "Okay. We want to move forward. I'm going to
3 identify my client, and I would like to
4 schedule a meeting." And very shortly after
5 that, I was told that I would be introduced to
6 Mr. Davis because they already had an active
7 investigation.

8 THE COURT: Okay.

9 MR. DAVIS: Judge, may I make a brief
10 proffer on that?

11 THE COURT: Absolutely. I was just going
12 to ask you to do that. Yes.

13 MR. DAVIS: So, Judge, the New Hampshire
14 federal investigators' open investigation at
15 the end of 2017 -- that was based on bank
16 information regarding the wires to Pakistan.
17 And so well before we knew anything about
18 anything at United Way, both the FBI and
19 Homeland Security had an open investigation
20 that I, at least, had a meeting and maybe two
21 meetings at. Some subpoenas were issued. So
22 we were -- and we were aware of Mr. Alrai's
23 travel in the spring of 2018. And, if you
24 recall, there was evidence about the border
25 search as he came back in in April of 2018.

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1 So all of that had happened in this case
2 with New Hampshire before Mr. Commisso called
3 Mass. And the FBI notified me that United Way
4 had called Massachusetts. I communicated with
5 the fraud chief in Boston. And we quickly
6 resolved that, because we had the open case, we
7 would continue.

8 THE COURT: Okay. That's actually fairly
9 significant -- to me, anyway. And I think
10 that's the first time I've heard that.

11 The reason I say that is only because if
12 one has to sit -- I mean, look, I think the
13 motives of counsel representing a client who's
14 been victimized -- or allegedly victimized,
15 right, by an employee are not hard to
16 understand.

17 But it's a very different picture of
18 Mr. Commisso seeking twice to have a case
19 investigated and prosecuted by the Boston
20 federal authorities, being rebuffed, and then
21 coming to New Hampshire and affirmatively
22 seeking that out. That's a very different
23 picture than you've presented, because it would
24 -- it might suggest more about the intensity of
25 counsel's or the client's wishes to have the

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1 case prosecuted for any number of reasons.

2 So the fact that there's an open case
3 already and you knew it was underway is -- I
4 think that's significant information, and I'm
5 glad to have it now.

6 THE WITNESS: And, Your Honor, I was never
7 rebuffed in my discussions with the prosecutor
8 in Massachusetts.

9 THE COURT: Yeah, I gather that now. I
10 gather that now. It's just one of those things
11 that gets worked out between districts. Okay.
12 Second question about that.

13 When you first dealt with federal
14 prosecutors, Mr. Commisso, be it Boston or
15 New Hampshire, I know you eventually produced
16 documents pursuant to a grand jury subpoena, or
17 a number of them; right?

18 But in your initial contact -- I can think
19 of when I was a prosecutor, if I had received a
20 contact from a victim -- an alleged victim or
21 their counsel, I probably would have requested
22 some documents just to kind of get started --
23 to review the situation.

24 Did that happen here?

25 THE WITNESS: So your question was broken

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1 up and I might have missed the important part
2 of it.

3 So you said "did that happen here." Did
4 what happen here?

5 THE COURT: Before you began responding to
6 grand jury subpoenas, were you responding to
7 other sort of just more informal or less formal
8 requests for information? Did any of the
9 prosecutors or federal agents ask you to give
10 them any documents so they could review your
11 situation and decide whether to open a case?

12 THE WITNESS: So what I remember was a
13 first meeting with Mr. Davis at the very
14 beginning of June.

15 THE COURT: As to what?

16 THE WITNESS: The very beginning of June,
17 approximately June 3 or 4. And Mr. Vossio
18 attended with me.

19 And at that meeting, we had a small binder
20 of documents, approximately 15 to 20 documents,
21 that we had put together that helped to tell
22 the basic story as we understood it. And I
23 believe we left one or more copies of that
24 binder with Mr. Davis or with the agents.

25 And within 24 hours of that meeting, we

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1 had a grand jury subpoena. And I believe we
2 started producing and enrolling production --
3 batches of documents as quickly as we could.

4 THE COURT: Okay. Yep.

5 My other question, and I want to ask this
6 question again with Mr. Commisso still on the
7 witness stand, only because I think the next
8 witness won't have any information about it.

9 I want to explain how I remember something
10 and to determine if I have it right or wrong
11 through Counsel. My memory is that

12 Mr. Harrington moved to exclude Mr. Naviloff.
13 And then we got -- this is before COVID, but we
14 got on the -- I think it was a telephone call
15 together, because it was kind of a discovery
16 dispute in a way. At least that's the way I
17 saw it. I was never really seriously
18 considering excluding Mr. Naviloff, but I
19 thought, I think maybe correctly, that this is
20 just an attempt to get information.

21 And what I said was -- and tell me if I
22 got this wrong -- I said, "Look" -- I asked him
23 on the phone, "Mr. Harrington, what do you
24 want?" He kind of listed it out.

25 And I sort of charged you guys to -- the

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1 prosecutors and defense lawyers to "go work it
2 out and get back to me if you can. If there's
3 anything you disagree about, let the Court know
4 and I'll resolve it." But my memory is you did
5 resolve it. And that's -- I think the letter
6 we've seen in this hearing was part and parcel
7 to that process. It was sort of a request from
8 Mr. Harrington about -- a bullet list of things
9 he wanted, and you were working through it
10 together.

11 I don't remember you coming back to the
12 Court saying, "We have these areas of
13 disagreement. Could you resolve them?"

14 Do I have that right, roughly, if anybody
15 remembers -- Mr. Hunter, Ms. Le, Mr. Davis --
16 about what happened?

17 MR. HUNTER: I think so, Your Honor. I
18 think there was one point of disagreement.

19 And that was Mr. Harrington sent us a list
20 of search terms for John Commisso to run
21 through the e-discovery database. And that's
22 what prompted Mr. Commisso's letter.

23 We forwarded it to him. And it was -- the
24 cost to reactivate the database, and run the
25 searches, and do the review that would be

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1 required -- so that was the thing we weren't
2 able to resolve. But we were able to resolve
3 other issues, which goes to -- like, I've got
4 to find the documents anyone from RSM clicked
5 on, for example, was part of that resolution.

6 THE COURT: Yeah. I think -- did I sort
7 of give you a new list of search terms that was
8 somewhat narrowed? Did I do that? Or how did
9 we get that resolved? Anybody remember?

10 MR. LE: Go ahead, Mr. Commisso.

11 THE WITNESS: So what I recall is we had a
12 hearing about the list of search terms and
13 about my letter. And there was a discussion --
14 there certainly was no agreements.

15 I'm not sure about the resolution, but in
16 terms of how it was reported on the docket, I
17 believe if you look at one of the final orders
18 on the docket before trial, it makes a
19 reference to "the matter is resolved as stated
20 at the hearing," or something like that, so
21 that you have to read the transcript to know
22 how it was resolved. That's what I remember.

23 THE COURT: Okay.

24 But, certainly, nobody stood up and said,
25 "No, I'm entitled to something I haven't

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1 received." Or no one said, "Judge, we still
2 haven't produced this, and we'd like you to
3 resolve it." Once I issued that order, I don't
4 think we heard anybody else object or counter
5 that. Okay.

6 Ms. Brown, if you have any different
7 information, by the way, please share it. You
8 weren't there at the time, I know, but you
9 might have a different understanding.

10 MS. BROWN: Not about what was said at the
11 hearing. I think -- in terms of understanding,
12 I think one of our issues is -- I kind of
13 referred to it at my cross-examination --

14 That discovery isn't about "Simon Says."
15 That you don't use -- it was very clear that
16 Attorney Harrington and his partner were trying
17 to get at the basis of Mr. Naviloff's opinion.

18 Where was it coming from? What was it
19 based on? Who did he consult with? All of
20 those things. And he may not have used the
21 precise words to trigger a search of -- but I
22 don't think that's necessary for Brady.

23 I think, first of all, the Government has
24 the obligation of Brady, regardless of whether
25 the Defendant asks for it. Because if you

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1 don't know it's there, you don't know what to
2 ask for.

3 But, secondly, there's no question that
4 counsel for Mr. Alrai was trying to get at the
5 bottom of this opinion, both on the advice of
6 his expert in IT, and because he wanted to be
7 able to cross-examine this witness about the
8 basis of his opinions. And that's articulated
9 in document 47. So I don't think it's a matter
10 -- it's not necessary for a Brady violation
11 that he used a magic term to get a magic
12 document. And so I just wanted to add that.

13 But I will also agree that how the
14 litigation regarding Naviloff tied up was
15 somewhat loose in terms of whether that --
16 like, whether that motion was still live or
17 not. It sounds like there was some resolution.
18 It's not like a situation where Attorney
19 Harrington filed a motion to withdraw the
20 motion to exclude Naviloff.

21 Or did he say, "Oh, well, yeah, I'll take
22 some discovery" -- was he withdrawing his
23 objection by accepting additional discovery?
24 That's not clear to me.

25 THE COURT: Well, it's clear to me. It's

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1 clear to me only because I'm trying to keep
2 your motion in context.

3 There wasn't a request, once the Court
4 said it was resolved or during the trial, where
5 anybody said, "Look, there's something I was
6 entitled to I didn't get." But your point
7 about Brady is well-received. I understand
8 your point.

9 It's just that -- I can't say that I'm
10 persuaded by it, but I understand that there's
11 a difference between you didn't comply with the
12 discovery rule or order and, well, during your
13 compliance, you either became aware or should
14 have become aware of Brady material to which I
15 am entitled, regardless of any order or rule.
16 That's a different thing.

17 And that's your argument; right?

18 MS. BROWN: That is my argument. That's
19 what I'm going to address when I sum up the
20 presentation.

21 THE COURT: Okay. I just wanted to have a
22 conversation while we still have Mr. Commisso
23 here under oath. I think I've got the answers
24 as best as I'm going to get. And I think we
25 should move on to the next witness.

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1 MS. BROWN: Well, Your Honor, over the
2 weekend and again this morning, Cocounsel and I
3 have conferred. And I don't think we're going
4 to call Mr. Meyer. Most of what we get from
5 him is rehashing his testimony, which is --
6 there's a transcript of it, and it is what it
7 is. I don't think we need him to go through
8 his testimony again, because it's the record.
9 So we've elected not to call him.

10 I'll ask Attorney Comisso if he can
11 notify Mr. Meyer. I know he's been waiting,
12 and I apologize for that. But we couldn't make
13 that call until we had examined Mr. Comisso.
14 So that would be our final -- well,
15 Attorney Comisso would be our final witness.
16 We do have some summation for the Court.

17 I don't know if the Government has any
18 witnesses. I don't think they do, but --

19 THE COURT: Give me a second then. I'm
20 just going to check my notes in case there's
21 anything I wanted to ask Mr. Comisso that I
22 would have asked Meyer. Hold on a minute.
23 Okay.

24 I have some questions, but I think only
25 one of them needs to be done now with

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1 Mr. Commisso.

2 I'm looking at document 1-64-12,
3 Exhibit 12 to Attorney Brown's motion. It's an
4 email -- we've talked about it. It's an email
5 where Mr. Naviloff emailed Mr. Commisso some
6 folders.

7 And he said, "Let's discuss the contents
8 of these four folders for potentially providing
9 to the USAO"; right? And I guess my question
10 is -- like, I'm not sure who to ask this of.

11 Which of the three of you prosecutors was
12 primarily dealing with Mr. Naviloff? Was there
13 one of you who was doing it, or was it all of
14 you?

15 MR. DAVIS: Judge, I would say
16 Mr. Naviloff was Matt Hunter's witness, but
17 that I was the lead. And I think we talked
18 about -- Matt and I probably talked about every
19 issue of significance with Mr. Naviloff.

20 THE COURT: Then here's my question for
21 both of you. I'll ask you first, Mr. Davis.

22 Were you aware that Naviloff, who is by
23 this time your expert -- okay. You retained
24 him -- were you aware he was consulting with
25 Mr. Commisso about his productions to you?

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1 MR. DAVIS: So, Judge, I would have said
2 what I was aware of was that anything that
3 potentially involved privilege -- that is,
4 United Way's privileges that were still being
5 asserted -- would be run through Commisso. And
6 in numerous discussions with Naviloff, that
7 step in the process was always acknowledged and
8 something we expected. And Matt may be able to
9 supplement that further, but I certainly --
10 well, I guess I'll leave it at that.

11 THE COURT: Well, would you agree with me,
12 though, that this email, unless I misunderstood
13 the testimony from the witnesses in this
14 hearing -- this conversation seems to go beyond
15 that? This isn't clearly a discussion of
16 what's privileged, unless I'm misunderstanding.
17 This seems to go beyond a discussion of
18 privilege.

19 And it has Mr. Commisso involved in
20 Naviloff's document productions in a way that
21 exceeds or that goes beyond the scope that you
22 just described about privilege discussions;
23 right?

24 MR. DAVIS: I certainly agree it's beyond
25 the scope of privilege. I think Mr. Commisso

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1 can further illuminate that, and Matt, maybe,
2 as well. Because I think it's fair to say that
3 Naviloff, at various times, would have
4 encountered a scope issue. Because he's at
5 RSM. And RSM, writ large, is doing several
6 different things for United Way.

7 And my understanding -- my broad
8 understanding of this issue is that it was a
9 scope question for Naviloff. That is, are all
10 of the folders on this thing what we're talking
11 about here or not? I don't read it as a
12 relevancy sort of conference between Naviloff
13 and Commisso.

14 THE COURT: Yeah. I almost wish I had
15 sequestered all of you before we had this
16 conversation, but I'm just going to continue
17 with you. I don't mean that in an insulting
18 way. I hope you don't take it that way. It's
19 just we all, as human beings, have a tendency
20 to influence each other.

21 But, Mr. Davis -- so what you just said
22 there -- my understanding is that goes to this
23 scope issue involving RSM's work that goes
24 beyond loss calculation; okay?

25 And I guess my question -- and you said,

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1 "I read this as a discussion of that kind of
2 scope issue, because we both agree it's not
3 privileged."

4 What's the basis for that understanding?
5 What makes you read it that way? What is the
6 basis for your understanding that this isn't
7 Mr. Naviloff consulting with Mr. Commisso
8 regarding his production to your office
9 regarding loss calculation?

10 MR. DAVIS: I think it's what I've been
11 told about it. And I just -- I don't trust my
12 memory. I'm not looking at the document,
13 either. I would defer to Matt Hunter and
14 Commisso on the point.

15 And I'm sorry I'm not being helpful. As
16 you might have guessed, Judge, I'm 62.

17 Questions about folders, I'm not as sharp on.
18 I don't mean to make excuses, but I would trust
19 Matt's memory and I would trust John Commisso's
20 memory much better than I.

21 THE COURT: And I accept your answers, by
22 the way, as being as honest and straightforward
23 as your memory will allow.

24 Mr. Hunter, do you follow that line of
25 questioning? It appears to Mr. Davis, and I

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1 agree, that this conversation here in this
2 Exhibit 12, document 1-64-12, is not about
3 privilege. Now, Mr. Davis has told me what he
4 thinks it refers to, and then he's explained to
5 me why he thinks that -- what the basis is.

6 What's your understanding of what this
7 conversation's about, if you have one? Well,
8 let me ask you first a question that I asked
9 Mr. Davis first.

10 Were you aware that Mr. Naviloff was
11 consulting with Attorney Commisso, part and
12 parcel to this production of his expert file to
13 you?

14 MR. HUNTER: So the part that I was aware
15 of, Your Honor, was that, similar to what
16 Mr. Davis said -- that United Way waived its
17 privilege as to RSM's loss analysis, but not
18 everything that RSM did. So I was aware that
19 RSM, because they couldn't waive the privilege
20 or produce privileged materials, was consulting
21 with John Commisso to ensure that they were
22 producing things that were within the scope of
23 that waiver, and were not producing things that
24 had to do with other work that RSM was doing.
25 So that was my understanding of that.

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JOHN COMMISSO

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1 And regarding -- and I don't know exactly
2 the title of this particular email, but I do
3 know that when we got it -- a discovery request
4 from --

5 THE COURT: It's August 2019.

6 MR. HUNTER: Okay. So, yeah, this is when
7 we're getting discovery requests from
8 Mr. Harrington. And I know what we asked RSM
9 for is we wanted basically the work file --
10 like, all of their analyses, any documents that
11 they had that they relied on or considered in
12 their analysis. And we were looping in
13 John Commisso to ensure that RSM didn't produce
14 something that was outside the privilege
15 waiver.

16 So my understanding was that was what the
17 consultation was about. Not -- again, not to
18 discuss what is relevant to your loss
19 calculation; but is this something that relates
20 to other work streams that RSM was doing for
21 the United Way?

22 THE COURT: Okay.

23 And what's the basis of that
24 understanding? Where did you learn that?

25 MR. HUNTER: The basis for that

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JOHN COMMISSO

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1 understanding -- it is where we were at this
2 stage in the litigation, the summer before
3 trial. Because I think at that point there was
4 a general understanding that United Way had
5 waived all privileges to the work Naviloff did
6 for loss. But we knew that there was other
7 work that RSM had done.

8 THE COURT: So you're surmising that based
9 on the timing of the conversation?

10 MR. HUNTER: And my understanding at that
11 time of the nature of United Way's privilege
12 assertion. That we had asked RSM to -- we had
13 asked to ensure that -- we knew that RSM was
14 consulting with John Commisso regarding
15 privilege, and we asked them to do that.
16 Because we didn't have a right to seek
17 privileged material.

18 But what we asked for is we wanted
19 everything that had to do with the work
20 Greg Naviloff did as to loss. So that was my
21 understanding of what -- the discussions we had
22 had and what we were seeking to get.

23 THE COURT: But, again, you're surmising
24 it. You're basing your understanding of what
25 this email means based on its timing and your

Excerpt Testimony
JOHN COMMISSO

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1 understandings of, as you point out, the scope
2 of the waiver and other work streams.

3 In other words, it's not like you know
4 today, one way or the other, whether Naviloff
5 was just plain consulting with Commisso about
6 what to produce?

7 MR. HUNTER: I certainly -- we've had a
8 whole hearing about this. I think that
9 Greg Naviloff and John Commisso haven't said
10 that there was that sort of activity going on.
11 And we certainly did not ask for that type of
12 activity to be going on. And so I have no
13 reason to think that that activity was going
14 on.

15 I understand there's this email. But I
16 see this email is consistent with what we did
17 understand, which was John Commisso was
18 protecting United Way's privilege. I
19 suppose -- I have no reason to think or dispute
20 that that is what was happening, if
21 John Commisso testified about it and
22 Greg Naviloff testified about it.

23 THE COURT: I know, but -- okay. That's
24 true. But Ms. Brown filed a motion about it.
25 And there's been a lot of time since you filed

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JOHN COMMISSO

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1 the motion and we had the hearing.

2 So I guess I'm asking you, did you talk to
3 witnesses and say "what's this all about?"
4 Because you haven't told me that's the basis
5 for your understanding. You're sort of
6 surmising it. And, like, that's fine, but
7 there's also just preparing a witness.

8 "Hey, were you consulting with Commisso
9 about everything you did before you did it?
10 And in what way, and about what?" I mean, did
11 you have those conversations? It sounds like
12 you did not.

13 MR. HUNTER: So those conversations are --
14 we asked Greg Naviloff and John Commisso to
15 prepare declarations of what they did and what
16 happened. And those are the declarations that
17 we attached to our motion.

18 THE COURT: And I don't mean to be flip
19 here, but I'm taking that as a "no," that you
20 didn't ask him these questions that I'm asking
21 you right now.

22 Like, "What was this conversation about?
23 What was your work -- what was the nature of
24 your working together?" These are -- I don't
25 look at any of this as inappropriate, but I

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JOHN COMMISSO

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1 want to understand it. And we're all kind of
2 circling around it a little bit. I guess
3 that's the best we're going to do.

4 MR. HUNTER: Your Honor, the reason why --
5 we tried to go through every single email that
6 Defense counsel attached to their motion. We
7 did have, I think, the general conversation
8 that is reflected in the declaration -- that he
9 did a review for privilege. And that was our
10 understanding.

11 THE COURT: So you're telling me, then,
12 that Defense counsel files a motion with an
13 email where your expert is talking to the
14 lawyer for the victim and saying, "Let's
15 discuss these documents before we produce them
16 to the U.S. Attorney."

17 And you didn't put that in front of the
18 witness and say, "What is this about? What's
19 going on here?" That didn't happen?

20 MR. DAVIS: Judge, I would just add --

21 THE COURT: Wait a minute. Whoa. Whoa.

22 MR. DAVIS: I'm sorry.

23 I'm just saying, any prep of the witness
24 is mine, Judge, not Matt Hunter's.

25 THE COURT: Oh, well, I guess I'll ask

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JOHN COMMISSO

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1 you.

2 I mean, is that something you -- I realize
3 the answer could be yes or no, but I'm asking
4 what it is.

5 Did someone ask Naviloff, did someone ask
6 Commisso, "What's this about?"

7 Because I just asked you a minute ago,
8 "What's the basis for your understanding?"

9 And you didn't say, "I asked him before
10 the hearing and they told me." You said -- I
11 don't know.

12 MR. DAVIS: I don't believe I put either
13 of the emails in front of either witness. And
14 I don't think we specifically discussed that
15 question.

16 THE COURT: Okay.

17 THE WITNESS: So, Judge, I'd be happy to
18 respond to any of these questions.

19 THE COURT: No, I'm good, Mr. Commisso. I
20 do have some questions about the process, but
21 that was really the only one.

22 Well, I guess, let me just ask you this,
23 Mr. Commisso: Have you heard anything from the
24 prosecutors that's inconsistent with your
25 understanding of what's transpired here in

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1 terms of your dealings with Naviloff or your
2 dealings with them?

3 THE WITNESS: Well, I think there's a lot
4 that I could say that would clarify these
5 issues. And I can tell you what I was doing
6 with Naviloff, and why, during that period of
7 time.

8 THE COURT: And I'm sure you could. The
9 question isn't so much your answers to it. The
10 question is whether anybody -- is whether the
11 trier of fact in this trial had an opportunity
12 to hear all this. All right? Because there's
13 lots of inferences that can be drawn. That
14 seems to be lost on everybody here.

15 The fact that you guys have an account of
16 what happened, whether or not I think it's
17 accurate based on any number of factors, like
18 your memories, your motives now, your motives
19 at the time -- those are all interesting
20 issues. But those are
21 a-trier-of-fact-for-a-trial issues.

22 I know I'm supposed to do a privilege --
23 not privilege -- a prejudice assessment here.
24 It's part of the burden. But I'm not -- I
25 think I have the information I need to make

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JOHN COMMISSO

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1 that assessment. Because if there's something
2 I don't understand, there will be explanations.
3 I know there will be.

4 And you're a defense lawyer. You
5 understand. Criminal trials are about
6 cross-examination. They're about testing the
7 witnesses. Let me just ask you this,
8 Mr. Commisso.

9 You've, I'm sure, represented clients
10 either facing trial or in trial where the
11 prosecution had expert witnesses; right?

12 THE WITNESS: Yes.

13 THE COURT: I mean, have you?

14 THE WITNESS: Yes.

15 THE COURT: And I assume that you make
16 your normal discovery requests, and you're
17 provided with the file or whatever you've
18 requested in some form; right?

19 THE WITNESS: Correct.

20 THE COURT: Have you ever had one where an
21 expert was working with a staff from his or her
22 business, whether it was an accounting firm or
23 something, where underlings or coworkers were
24 also working on the file?

25 THE WITNESS: No, I can't think of

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JOHN COMMISSO

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1 something in particular that matches that
2 circumstance.

3 THE COURT: A straight answer. I
4 appreciate it.

5 But if you did -- because there's a 6th
6 Amendment right to confrontation law on this;
7 right? If you did, wouldn't you expect to see,
8 if you had an expert -- if you're dealing with
9 an expert testifying against your client facing
10 felony charges, I assume you wouldn't want to
11 just see what -- you wouldn't take the expert's
12 word, first of all, about what he relied on.

13 You'd want to see everything he reviewed;
14 am I right?

15 THE WITNESS: Well, that gets to the heart
16 of the issues in this case.

17 THE COURT: Well, that's exactly why I'm
18 asking you.

19 Are you telling me that an expert witness
20 testifying against your client in a federal
21 criminal trial -- you would take the expert's
22 word for what he relied on, and not everything
23 he reviewed?

24 THE WITNESS: I would make a request for
25 all the documents that he reviewed and relied

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1 on.

2 THE COURT: Right.

3 And if he was working with underlings -- a
4 staff or coworkers, you'd want to see the
5 communications between them, wouldn't you?

6 THE WITNESS: Well, I don't know that I
7 would have the right to. The rules of
8 discovery don't go that far.

9 THE COURT: Not my question.

10 Would you request it?

11 THE WITNESS: If I was doing my job well,
12 yes, I would expect to request it.

13 THE COURT: And wouldn't you expect, once
14 you requested it, the prosecutors at least to
15 review it to determine whether or not you were
16 entitled to it -- at least review it to
17 determine if there was exculpatory evidence?

18 THE WITNESS: Well, no, not if it's
19 outside the bounds of discovery.

20 THE COURT: So you'd make a request that's
21 outside the bounds of discovery, and not assume
22 that when they responded to it, maybe imposing
23 some restrictions on whatever you'd
24 requested -- you would assume they hadn't even
25 reviewed it?

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1 THE WITNESS: Well, now I'm thinking about
2 the context of this case. And I'm thinking
3 about the fact that the Government didn't have
4 possession of this evidence, and the evidence
5 that we're talking about now was way outside
6 the bounds of permitted discovery. So I would
7 not have expected the prosecutors to have
8 requested this discovery that nobody thought
9 the Defendant was ever entitled to.

10 THE COURT: So when you were going through
11 the items, because I -- by the way, I do accept
12 that Mr. Harrington didn't make a request for
13 internal communications. I do, unless there
14 was no violation of any sort of rule or order
15 there. I'm with you.

16 But were there discussions between you and
17 the prosecutors about the internal
18 communications at RSM regarding this document
19 review? It would seem strange to me that one
20 would rely on all these people that are
21 reflected in the bill that wasn't produced, and
22 not -- just at least discussed the
23 communications.

24 THE WITNESS: Well, I would say no. And
25 the reason why I feel confident saying no is

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1 I'm looking now at Mr. Harrington's discovery
2 request from July 30, which I think was the
3 first one.

4 THE COURT: Yeah.

5 THE WITNESS: And he asked for a copy of
6 all documents and other data "collected and
7 reviewed by RSM in calculating the loss."

8 And those words, "collected and reviewed,"
9 meant something to me, because that's exactly
10 what I think of when I think of expert
11 discovery. And those are the United Way
12 documents. Those are the invoices, the
13 contracts, the accounting record; right?

14 THE COURT: Yeah.

15 THE WITNESS: So that's what we're talking
16 about -- is where do we find the documents that
17 were collected and reviewed?

18 And then in another request it was
19 "reviewed and relied on."

20 But at no time do I remember saying "where
21 do we find" or "who's going to find" or "should
22 we find the internal work papers and the
23 internal email communications?"

24 THE COURT: I understand -- believe me, I
25 understand that it wasn't requested --

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1 demanded.

2 But to me, "relied on" -- I mean, if
3 you're going to rely on -- if you, as an
4 expert, are going to rely on underlings to
5 develop IT -- because he's not an IT expert.
6 He's an accountant; right? We talked about
7 that ad nauseam. It was trial testimony. If
8 I'm going to rely on -- I forget his name...

9 THE WITNESS: Ryan Gilpin.

10 THE COURT: Ryan Gilpin. Right. And
11 there was another one that -- he did testify at
12 trial. If you're going to rely on his work,
13 well, when he transmits that work to you, it
14 might very well include an explanation of his
15 analysis. And that would seem to me something
16 that the expert relied on.

17 I realize it wasn't as specified as
18 "producible, discoverable." But, to me, the
19 Brady obligation at least makes me wonder
20 whether that should be reviewed. And that's
21 kind of what I'm stuck on here.

22 THE WITNESS: And I guess I'm at least two
23 or three steps removed from that because I
24 wouldn't have been part of any decision-making
25 process about RSM's documents. And my mind

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JOHN COMMISSO

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1 never went anywhere in that direction with
2 respect to those kinds of internal
3 communications. It's not something I've ever
4 talked about in any litigation -- that that
5 would be subject to discovery.

6 THE COURT: I accept everything you say,
7 except the first thing you said is that you
8 were not involved in the production of RSM --
9 you were involved in the production of RSM
10 documents. RSM's witness was asking you
11 questions about what to produce.

12 THE WITNESS: With respect to United Way
13 documents.

14 THE COURT: Oh, I see, not RSM. Yeah, I
15 mean, I think of the RSM documents as what RSM
16 reviewed. And I view it as their
17 communications with each other, although I do
18 realize that those were not requested or
19 ordered to be produced. This puts this in a
20 very sort of odd posture. Okay.

21 Listen, I asked Mr. Commisso some
22 questions. If either side wants to pursue my
23 line of questioning with cross or direct, or
24 whatever you want to call it -- if you want to
25 cross my exam, I'll allow Ms. Brown first and

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1 then Mr. Davis.

2 Any questions, Ms. Brown?

3 MS. BROWN: I just wanted to clarify to
4 Mr. Commisso.

5 Q. (By Ms. Brown) As a criminal defense lawyer,
6 you're also familiar with constitutional law;
7 right?

8 A. Yes.

9 Q. And so you're familiar that there's case law
10 that says a defendant may object if the expert
11 who is giving the opinion on the witness stand
12 is not the person -- is, for lack of a better
13 word -- I use this -- ghost expert.

14 So if there is a testifying witness and
15 that witness is testifying to things that
16 would, arguably, be hearsay or at least not
17 allow the Defendant to cross-examine the
18 opinions that come from some other expert, a
19 criminal defense attorney may want to object to
20 that, because they can't cross-examine the
21 underlying opinions if that person isn't
22 called; do you understand that case --

23 A. I'm familiar with the idea because you briefed
24 it in this case.

25 Q. And so in order to make that objection that

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JOHN COMMISSO

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1 someone's opinion is coming from -- some
2 expert's opinion is coming from someone else,
3 you'd have to know about it; right?

4 A. I'm not sure what to say. I haven't litigated
5 this issue outside of this case, so I don't
6 have any experience litigating this specific
7 issue about expert discovery in a criminal case
8 like this.

9 Q. But you did have the billings that RSM sent to
10 you. And, in fact, your name is right on the
11 bill that they sent to you for their work both
12 for RSM -- I don't think they would have sent
13 you the bills for the Government -- but they
14 sent you the work that they, meaning RSM, did
15 for United Way; right?

16 A. Yes, I received bills from RSM.

17 Q. And you understood that at least six or seven,
18 if not more, people worked on the loss
19 analysis; correct?

20 A. I understood what the bills showed. And, yes,
21 I met more than six or seven people over the
22 course of the engagement.

23 Q. And that was information that you were privy to
24 that, as far as you know, the Defense attorney
25 didn't know about.

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1 **You didn't share your billings with**
2 **Defense counsel prior to trial, did you?**
3 A. I don't know whether he was privy to it or not.
4 And I know he never asked me for that
5 information.

6 MS. BROWN: I have nothing further.

7 (The requested testimony concluded at 2:02
8 p.m.)

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